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United States

ARGUMENT AT GENEVA

A COMPLETE COLLECTION
OF THE FORENSIC DISCUSSIONS ON THE PART OF
THE UNITED STATES AND GREAT BRITAIN
BEFORE THE TRIBUNAL OF ARBITRATION
UNDER THE TREATY OF WASHINGTON

AS PUBLISHED
BY AUTHORITY OF THE GOVERNMENT

UNIVERSITY OF VIRGINIA

NEW YORK
D. APPLETON AND COMPANY
1889

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1889
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UNIVERSITY
OF VIRGINIA

PAPERS

RELATING TO

THE TREATY OF WASHINGTON.

VOLUME III.—GENEVA ARBITRATION.

CONTAINING THE ARGUMENT OF THE UNITED STATES; ARGUMENT OF HER BRITANNIC MAJESTY'S GOVERNMENT; AND SUPPLEMENTARY STATEMENTS OR ARGUMENTS MADE BY THE RESPECTIVE AGENTS OR COUNSEL.

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II.

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I.

ARGUMENT

OF

THE UNITED STATES,

DELIVERED TO

THE TRIBUNAL OF ARBITRATION

AT

GENEVA,

JUNE 15, 1872:

JUNE 10, 1872.

SIR: We have the honor to hand you herewith the argument prepared by us as counsel of the United States, in order that, in pursuance of Article V of the treaty of Washington, it may be presented in their behalf to the tribunal of arbitration constituted by that treaty.

We have the honor, sir, to be your obedient servants,

C. CUSHING.
WM. M. EVARTS.
M. R. WAITE.

J. C. BANCROFT DAVIS, Esq.,
Agent of the United States.

ARGUMENT.

I.—INTRODUCTION.

By the fifth article of the treaty of Washington, it is provided that, "it shall be the duty of the agent of each party, within two months after the expiration of the time limited for the delivery of the counter case on both sides, to deliver in duplicate to each of the said arbitrators and to the agent of the other party a written or printed argument, showing the points and referring to the evidence upon which his government relies."

Argument presented in accordance with provisions of treaty of Washington.

The undersigned have had the honor to receive the instructions of the Government of the United States to prepare, and place in the hands of the agent of that Government, the argument on its part, contemplated by this article of the treaty, in order to its submission to the tribunal of arbitration, as in said article is provided.

In execution of this duty, thus intrusted to them by their Government, they respectfully present the following argument on behalf of the United States, conformed to the requirements, in this respect, of the provisions of the treaty under which it is submitted.

Before entering upon the argument in the due order of its presentation and development, we may be permitted, with some advantage to the correct understanding of the precise service which we hope to be able to render to the arbitrators, in the discharge of the arduous and responsible duty which they have undertaken, to point out the character and extent of the discussions on the part of the two contending nations, which have already been laid before the tribunal.

In the Case of the Government of the United States and in that of Her Britannic Majesty's government, delivered to the tribunal on the fifteenth day of December last, are carefully set forth, in considerable fullness of detail, the principal matters of historical fact, of legal proposition, and of supporting evidence and authorities, which make up the body of the controversy submitted to the judgment of the tribunal by the high contracting parties to the treaty of Washington. In the seven volumes of proofs which accompany the Case of the United States, and in the four volumes which hold a like relation to the Case of Great Britain, are collected, with much else that is pertinent and important, the documents of the diplomatic treatment of the specific controversy, from the commencement of the American rebellion to the conclusion of the treaty, exhibiting, in the most authentic form, the real nature of the differences between the two nations, as they showed themselves in the immediate presence of the events which gave rise to them.

The respective cases and documents.

In the Counter Cases of the two governments, delivered to the tribunal on the fifteenth of April last, the deliberate criticisms of the adverse parties upon the respective original cases have already advised the arbitrators wherein there is a substantial concurrence between them in their estimates of the facts and the law of the matter in

Counter cases

judgment, and wherein opposite or qualifying opinions are insisted upon, or are reserved for fuller treatment in the argument provided for in the fifth article of the treaty. The volumes of proofs which have been presented with the Counter Cases seem designed either to supply what was thought wanting in the original exhibition of proofs, or to meet the contentions raised by the respective adverse original Cases of the two governments.

The issues to be determined are now settled.

It may be assumed, then, that these volumes of proofs, and the Cases and Counter Cases of the two governments, not only present all the materials necessary or useful for the complete intelligence and just determination of this great controversy by the tribunal, but have, in a great measure, reduced the disputation between the parties and the responsible deliberations of the arbitrators within some definite and established limits.

To ascertain these limits and verify them to the approval of the tribunal, and to confine the subsequent discussion rigidly within them, we venture to think should be a leading purpose of this argument. If that purpose shall be successfully adhered to, and if we shall be able to array in a candid temper and with circumspect and comprehensive pertinency, the considerations that should control the adjudication of this tribunal upon the issues thus raised for its solution, we may hope to render, in aid of the deliberations of the arbitrators, in some degree, the service which it was the object of the fifth article of the treaty to provide.

If, however, we should have the misfortune to fail in our estimate of the true points of the controversy, or in our efforts to meet them, as they shall present themselves to the greater learning and intelligence of the tribunal, such error or misconception will not be remediless. The arbitrators may at any time before their deliberations are closed, "if they desire further elucidation with regard to any point, require a written or printed statement or argument, or oral argument by counsel upon it." With any such requirement it will be, at all times and in any form, both our duty and our pleasure to comply, and we shall hold ourselves in readiness to attend upon the wishes of the arbitrators in this regard.

II.—THE CONTROVERSY SUBMITTED TO ARBITRATION.

The counsel of the United States, in propounding to this august tribunal the cause in controversy between that nation and Great Britain, which its deliberations are to explore and its award to determine, have no occasion to feel that the celebrated publicists who represent the friendly nations which take part in this great arbitration are less instructed, already, in the general character and history of the public transactions which are to form the ground-work of the argument, than the eminent public servants of the contending parties, who are joined with them in the composition of the tribunal.

The arbitrators already acquainted with the general nature of the facts.

If the publicity and prominence of these events, so recent in the memory, did not themselves preclude any such suggestion, the ample record supplied by the documents presented to the tribunal by the two governments has put the arbitration in full possession of all facts, and their evidence, which, in the judgment of any one, can be thought relevant to the discussion of the principal and collateral issues, to which the judgment of the tribunal will need to be applied. In pursuing, therefore, our immediate purpose of attracting the attention of the tribunal to the elements of the controversy arising between the two nations, upon the actual events which gave it birth, and as it has been shaped for the investigation and determination of the tribunal by the contending parties in the treaty by which its jurisdiction is created, we shall have occasion to consider no matters which are either obscure or disputable, and none which may not be drawn with the same confidence from the documents laid before the tribunal by Great Britain, as from those presented by the United States.

I. When the great social and political interests developed by the institution of slavery, as it existed in the United States, carried the popular agitations beyond the bounds of obedience to the laws and loyalty to the Government of the United States, as set forth in Part II of the Case of Great Britain and Part II of the Case of the United States, it was not long before a great population occupying a large territory was drawn into an armed insurrection, and, as a next step, pushed into a military rebellion against the authority of the Government. The strength and menace of the attempted revolt soon grew to such proportions that the Government had recourse, in dealing with these rebellious hostilities urged against it, to its undoubted right of superadding to its peaceful authority of sovereignty the exercise of belligerent powers. It met the military array of the rebellion with the loyal forces of the nation, and used all the means for its suppression which the wealth, the courage, and the patriotism of the people placed at its disposal. Itself a great maritime power, both in naval strength and commercial prosperity, the resources of the rebellion included neither. The Government, by prompt, adequate, and successful exhibition of its naval strength, shut up the whole sea-board of the territory in rebellion by a blockade, and was proceeding to cut it off from all opportunity of es-

In suppressing an armed insurrection the United States exercised belligerent powers, and prevented insurgents from carrying on maritime war from their own resources.

tablishing foreign commerce, or maintaining maritime hostilities, from its own resources.

II. The principles of the law of nations recognize this necessity which the vigor and magnitude of rebel hostilities may impose upon the government of a nation, and attribute to a resort to its belligerent powers, in such case, no consequences affecting the attitude toward each other of the parties to these hostilities. Other nations are, manifestly, no parties to the conflict, and cannot become such parties, unless by choice, which is *intervention*, or by the enlargement of the theater of hostilities, or their actual course, forcing upon their notice such questions as specifically arise for solution.

The right to do this unquestioned. Other nations no parties to the conflict.

The effect of *intervention* is unequivocal. If attempted in aid of the belligerent sovereign, but without his request, it is officious, and may be unwelcome. If in aid of the rebels, against the sovereign, it is an espousal of their cause, and an act of war against the belligerent sovereign. In such a case, no situation of *neutrality* arises.

Abstinence of intervention by another power is not "neutrality."

But, if a nation abstains from intervention in the conflict between a sovereign nation and its rebels, it is inaccurate to treat this *abstinence* as *neutrality*. It is simply an unbroken maintenance of the international relations which subsisted between the two powers before the domestic peace of one of them suffered disturbance. It would shock the moral sense of civilization to speak of the United States as standing *neutral* between Great Britain and the Sepoy rebellion in India, or of Great Britain as standing *neutral* between the commune of Paris and the government of France.

It is a maintenance of previously existing relations.

But, when the actual hostilities in which a government is engaged, in the suppression of a rebellion, encroach upon the established relations between it and friendly powers, the latter have presented to them the question whether they will, each for itself, acquiesce in the exercise of belligerent powers, as sought to be made effective against the rebels, at the cost of inteference with the peaceful rights of commerce and intercourse which subsisted before the nation was brought into this stress by its domestic rebellion.

Other powers have to decide in such case only whether they acquiesce in the exercise of belligerent powers by the sovereign.

But this question, under the rules governing the subject in the modern law of nations, can have but one answer. The nation which has superadded belligerent rights to those of sovereignty, is entitled so to do, and resistance by other nations to the fair consequences of such rights upon their interests, is a violation of the law of nations, and an unjust intervention in the domestic conflict.

Non-acquiescence is intervention.

In regard to the hostilities prosecuted against the sovereign by the rebel, if they should pass beyond the bounds of intestine war and obtrude themselves upon the notice of other sovereign powers, the actual occurrences which raise the question of their treatment by such powers may be trusted, also, to solve it. If the rebels should exhibit their strength by a blockade of any of the ports of the nation, or should keep the seas with cruisers, and assert the right of search, of capture, and of prize condemnation, against the ships or cargoes of another nation, the power thus affected will determine for itself how it will treat this new disturber of its peaceful rights and interests. It has no *antecedent* obligations of friendship, of treaty, or of recognition, even, which compel it to acquiesce, under the law of nations, in the legitimacy of this violence. It may pierce by force the rebel blockade which impedes its commerce, resist and resent the search and capture which threaten its maritime property, and reject

Questions arising beyond territorial limits of the sovereign should be decided as they arise.

the asserted prize jurisdiction as working no change of title. And it may do all this, without, in the least, taking part in the hostilities of the government against the rebels or espousing its cause, but simply in maintenance of its own rights and interests.

Undoubtedly, it is competent for other nations upon whose notice the hostilities of rebellion, revolution, or revolt may obtrude themselves, to yield such assent and submission to their exercise, to the disturbance of their own rights and to the disparagement of their own interests, as, under sentiments of justice, fair play, or humanity, they may find an adequate motive for.

This course tends to, and naturally results in, a tacit toleration of this violence as in the nature of belligerent power, because it is practiced in that sense and under that justification by those who exert it. Placed, then, between the contending parties in the attitude of obligatory submission to the belligerent right of the sovereign, and of voluntary tolerance of the belligerent practices of the rebels, other nations fall gradually into an equality and impartiality in dealing with the rightful belligerent power and the *de facto* belligerent force, which assimilates itself to the *status* which, between two rightful belligerent powers, is called, in the law of nations, *neutrality*.

Such course secures impartiality and when justified by results, an equality between contending parties, which resembles what is known as neutrality when exercised between rightful belligerents.

This principle of public law, which we here insist upon, that is to say, the *right* of a sovereign engaged in the suppression of rebellion, to superadd belligerent powers to its resources of peaceful authority in dealing with the hostilities urged against it, and to expect from other nations an acceptance of the situation, as toward the sovereign so engaged, with the same consequences to themselves as if the same belligerent powers were put forth in solemn war, had been definitely held by the Supreme Court of the United States in a celebrated judgment pronounced by Chief Justice Marshall in the case of Rose *v.* Himely, in the year 1808. The case arose upon the exercise of belligerent powers by France in attempting to reduce the revolt of the island of San Domingo, and is reported in 4 Cranch, (Sup. Ct. Rep., p. 241.) It was only necessary, therefore, for the inferior courts of the United States, and for the Supreme Court on final appeal, in establishing this principle of public law in its operation upon other nations, when the United States were exercising belligerent powers in suppression of their domestic rebellion, to follow the reason and authority which had been accepted, as a rule of the law of nations, in this early case. We refer to the judgment in the "prize causes," reported in 2 Black's Sup. Ct. Rep., p. 635.

This principle recognized by the United States Supreme Court.

III. The only notable instances, before the rebellion in the United States, perhaps the *only* instances, in which friendly nations have been placed by this obligatory recognition of belligerent rights in the sovereign, and voluntary tolerance of belligerent powers in rebels, in an attitude assimilated to neutrality, have been where the conflict was of subject states seeking to recover their freedom, or between revolted colonies and the mother country, where independence in position, in boundaries, in interests, in population, and in destiny, already existing, in fact the only tie which remained to be severed was that of political sovereignty, and the severance of that tie was the only motive, object, operation, and expected result of the revolt. In such cases, the tendency on the part of other nations to adopt a practical neutrality is greatly prompted and facilitated by the political nature of the conflict, and the further consideration that the intervening seas, the common possession of all nations, are, necessarily,

Previous instances in point.

included in the theater of the war, and must become, more or less, the theater of actual hostilities. From such conflicts, every feature of domestic or intestine rebellion is necessarily absent. They are as dissimilar as are the throes of natural birth from the violence and horrors of mutilation. This difference asserts itself, at once, to the public judgment of other nations, and, scarcely later, to the contending parties, and thus, by the progress of the conflict, a habit of practical neutrality is easily established. But this habit imports nothing inconsistent with the principles we have insisted upon. The allowance by other nations of belligerent methods to the sovereign, is obligatory, systematic, and as his right. The allowance of them to the rebels is voluntary, *pro re natâ* always, and of sufferance.

Belligerent powers belong to the sovereign of right; to the rebel, of sufferance.

IV. In the first moments of the conflict, and when its confinement, as a domestic rebellion, within the territory of the United States, was successfully engaging the attention and the naval strength of the Government, Great Britain intervened, and assumed, by an act of sovereignty, exercised by the royal prerogative of the Crown as the representative of the nation in its foreign relations, to exalt the rebel hostilities to the same level with the belligerent rights of the United States in their suppression, and to place itself in the same attitude in reference to the conflict, as if it were a public war waged by two nations in their sovereign right, towards whom, under the law of nations, Great Britain was under equal obligations, independent of any choice, to respect their belligerent operations and maintain neutrality.

Conferring belligerent rights on the insurgents by Great Britain was an intervention.

The circumstances under which this celebrated proclamation of the Queen of Great Britain, of the judgment of that nation upon, and its purposes toward, the conflict pending within the territory of the United States between that Government and the rebels against its authority, was made, are set forth in Part II of the Case of the United States, pp. 43–65, and in Part II of the Case of Her Majesty's government, pp. 4–9. Our present purpose in referring to it is, merely, as being the first step taken by Great Britain in its relations to the conflict in the United States, which, as they showed themselves throughout its course, and have formed the subject of diplomatic correspondence between the two governments, and, finally, of the first eleven articles of the treaty of Washington, have given rise to the contentions between Great Britain and the United States which are submitted to this tribunal. It is only in its bearings upon these issues that we now comment upon its character and consequences, interpreted by the law of nations, as exhibited in the actual events that followed it.

The Queen's proclamation.

(*a.*) This proclamation, issued in London on the 13th of May, 1861, was purely voluntary, and anticipated the occurrence of any practical occasion for dealing with any actual rebel hostilities, which had invaded, or threatened to invade, the peace or dignity of Great Britain, or the security of the maritime or other property or rights of its subjects.

Was voluntary and anticipatory.

(*b.*) It was not required, in the least, in reference to the relations of Great Britain to the United States. They were fixed by intercourse, by friendship, and by treaties, in all general aspects, and by the principles of the law of nations, applicable to the new situation, which we have already insisted upon.

Was not called for by the relations between the two governments.

(*c.*) It had no justification in the public acts by which nations announce to their people and to the world their sovereign purpose to take part in, or to hold aloof from, a public war

Had no justification.

waged between sovereign powers, and thus enable their subjects to conform their conduct to the purpose, thus proclaimed, of their government. The existence of a civil war within the territory of a nation, certainly does not call for a proclamation from other powers that they do not espouse the cause of either party to this domestic strife.

(*d.*) The intervention of this public act of Great Britain produced certain important changes in the moral and in the legal relations in which its subjects, its commerce, its wealth, all its manifold resources, if aroused to active interference in aid of the rebellion, would stand, in the public opinion of the world, in the municipal jurisprudence of the realm, and in the doctrines of the law of nations.

And changed the legal relations between Great Britain and the insurgents.

So long as the rebellion in the United States remained unaccredited with belligerent rights, all maritime warfare in its name would have borne the legal character of piratical violence and robbery. It would have been justiciable as such everywhere, and punishable according to the jurisdiction to which it was made amenable. "With professed pirates there is no state of peace. They are the enemies of every country, and at all times; and, therefore, are universally subject to the extreme rights of war." (Ld. Stowell, in case of the Le Louis, 3 Dods. Adm. Rep., 244, 246.) "As every man, by the usage of our European nations, is justiciable in the place where the crime is committed, so are pirates, being reputed out of the protection of all laws and privileges, to be tried in what parts soever they are taken." "They are outlawed, as I may say, by the laws of all nations, that is, out of the protection of all princes and of all laws whatsoever. Everybody is commissioned, and is to be armed against them, as against rebels and traitors, to subdue and to root them out." "That which is called robbing upon the highway, the same being done upon the water is piracy." "When this is done upon the sea, without a lawful commission of war or reprisals, it is downright piracy." (Sir Lionel Jenkins, as cited in 1 Phill. Int. Law, §§ 356, 358.) The interposition of the Queen's proclamation relieved from the terrible proscription, pursuit, and punishment thus denounced, all who should take the seas in aid of the rebellion against the United States, and exposed them, at the worst, to the municipal penalties of the foreign-enlistment act, or the fate of prisoners of war.

Its effect upon the act of carrying on war on the high seas.

So, too, all commercial contracts, including the raising of money by loan, the building or fitting of vessels, the sale of arms or munitions or other supplies in aid of insurrection or domestic rebellion in a foreign state, are absolutely condemned as immoral in the law of England, and are proscribed by the courts of justice. (3 Phill. Int. Law, § 151; Forsyth Cons. Law, pp. 236–7.) The effect of the Queen's proclamation was to relieve all such contracts in aid of the resources of the rebellion from this proscription for immorality, which, otherwise, the law of England applied to them.

Its effect upon commercial contracts.

V. This public act of the government of Great Britain, of such profound import in its bearing upon the conflict which the United States were addressing themselves to, opened to the minds of the British people entirely new relations, moral, political, and legal, with the pending hostilities, and was followed by an active, constant, and systematic contribution from their inexhaustible financial and commercial resources, in supply of the deficiencies of the rebels, and in reduction of the disparity of strength between them and their Government. The methods and the results, in their nature and magnitude, of this participation of the people of Great Britain in the

It was followed by systematic contributions in aid of the insurgents.

domestic conflict which raged in the United States, are presented to the notice of the tribunal in the Case of the United States, are attempted to be qualified or justified in the Case and Counter Case of Her Britannic Majesty, and are displayed in the volumes of evidence submitted in support of the opposite contentions of the parties before the arbitrators. They were the subjects of contemporaneous correspondence between the two governments, in detail, at every stage of their occurrence, and, since the suppression of the rebellion, the adverse views of the governments concerning them, by the fortunate result of a long, a difficult, and an honorable and amicable course of negotiation, have been put in the way to a final settlement by the judgment and award of this tribunal. It only remains for us, under this division of the argument, to direct the attention of the arbitrators to the situation in which the governments of Great Britain and the United States stood toward each other, and to the subjects of difference between them, at the close of the domestic hostilities in connection with which they had arisen, and to the disposition of those differences sought to be accomplished by the treaty of Washington and the friendly deliberations of the arbitrators.

The United States suffered great injuries.

VI. The United States, notwithstanding the incompetency of the resources of the rebellion in these regards, and the adequate power and success of the Government in suppressing any such efforts, suffered during the conflict, in a very great degree, the injuries which can only be inflicted by hostile commerce and maritime warfare. In the three forms which make up the struggles of maritime war, foreign trade in contraband, violation of blockade, and prize capture, the United States were seriously vexed throughout their conflict, although they were engaged with an adversary which had no commerce, could build, equip, arm, or man no ships, kept open no ports, could furnish no convoy, offer or meet no naval battle, bring no prize *infra præsidia* or under judicial condemnation. By these maritime hostilities, their immense naval force was kept constantly occupied for four years, and their commercial marine was plundered, burnt, and driven from the seas. Their carrying trade in the commerce of other nations was swept away from them, and, in their own commerce, placed at a disadvantage in rates of insurance and freight. In a word, without a maritime enemy or a naval war, the United States suffered the stress, the injuries, and the losses which only naval belligerency could inflict.

Which resulted from aid and assistance originating in British jurisdiction.

VII. In looking for the agencies and operations which had wrought these disasters, the public history of the hostilities, and not less the definite and comprehensive proofs laid before this tribunal, exhibit them as worked out by schemes and enterprises of British origin, maintained by British resources, and placed at the service of the rebellion, under whatever motive of cupidity, of sympathy with that cause, or of enmity to the United States. Systems of British contraband trade, and organized merchant fleets for the breach of the blockade established by the United States; the British possessions, neighboring to the theater of the domestic war, made depots of hostile trade and covers for naval war—

> "accommoda fraudi
> Armorumque dolis;"

ships of war, British-built, armed and supplied, swift and vigilant for the destruction of peaceful commerce, swift and vigilant in elusion of armed pursuit—these were the agencies and operations which the rebel hostilities wrought into the service of their maritime war, and these the au-

thors of the wide-reaching disasters which the maritime property of the United States was subjected to.

VIII. A further examination shows, upon definite and unequivocal evidence, that these powerful and effective contributions of British aid to the pressing occasions of the rebel war, did not spring from the spontaneous and casual, disconnected, and fluctuating motives or impulses of mercantile adventure or cupidity, nor were their immense and prolonged operations sustained and carried forward by any such vague and irresponsible agencies. They were induced, stimulated, and directed by official and authentic efforts, in the name and by the authority of the rebel administration, represented by established agencies and permanent agents within the territory of Great Britain. It was an occupation of that territory, and an application of the manifold means which the boundless resources of its people supplied, by agents of the different departments of the rebel administration, there to conduct the preparations of its hostilities against the United States for which its original internal resources did not furnish the means, and which the belligerent power of the United States could prevent from being introduced or carried on within it. It was this system which is justly described, in the Case of the United States, and exhibited in the proofs, as equivalent, within the sphere of its operations, to using Great Britain as "the arsenal, the navy-yard, and the treasury of the insurgent confederates."

This aid was organized, systematic, and official.

IX. If the actual method and agencies of these disasters were thus manifest, the magnitude and permanence of the injuries suffered from them by the United States are, also, indisputable. These injuries were *specific*, in the shape of private losses and public expenditures, capable of somewhat accurate ascertainment and computation. They were also *general*, (1,) in the burdens upon the commerce of the United States produced by this naval warfare, and of which the enhanced premiums of insurance furnish some measure, and (2,) in the reduction of the mercantile marine of the United States, and the transfer of its trade to the British flag, which the public records of its tonnage will disclose. Besides injuries in these forms, the influence of these maritime hostilities upon the conduct, severity, length, and burdens of the war forced upon the Government of the United States, in maintenance of its authority and in suppression of the rebellion, constitute another head of injuries suffered by the United States from the prosecution of these maritime hostilities. In the aggregate, then, these injuries make up the body of the grievance which the United States have suffered from the incorporation into the rebel strength and war of the aforesaid agencies and operations, contributed thereto from the interests, the sympathies, and the resources of the people of Great Britain.

Nature of the injuries inflicted on the United States.

X. Upon a survey of the whole field of the international relations which had been maintained toward it by other friendly powers during the severe trials through which it had passed, the Government of the United States found no occasion to occupy itself with any grievance or to lament any disasters which it had suffered from foreign aid to the strength and persistence of the rebellion from any other source than from the action and agency of the people of Great Britain. If other great powers had followed, at greater or less intervals, the precedent of the governmental act of Great Britain in its proclamation, and issued formal declarations in the same sense, these governments had, essentially, kept the action of their subjects within the obligations of abstinence from the contest in obedience

No other nation instrumental in inflicting them.

to the requirements of the law of nations. The United States, therefore, had no duty to themselves and their citizens, and none to their position among the nations of the world, and in maintenance of justice and friendship in the future, which called upon them to assert any rights or redress any wrongs growing out of the conduct toward them of any other power than Great Britain.

They form the subject of this arbitration.

XI. The course of the public correspondence between the governments of Great Britain and the United States, whether contemporaneous with or subsequent to the events to which it related, disclosed so wide a difference in the estimates which the two governments placed upon the rights and duties of satisfaction and indemnity for the injuries the United States had suffered, and for which they were demanding redress from Great Britain, as to produce a situation of the greatest gravity and difficulty. Although it may be confidently hoped that the more general acceptance of the obligations of justice between nations has made it more and more difficult for two such governments to find themselves in the necessity of appealing to the resort by which, as Vattel expresses it, "a nation prosecutes its right by force," yet unappeased complaints of the magnitude and severity of those preferred by the United States against Great Britain do not easily pass into oblivion without some form of adjudication. Whether or not the resources of international justice shall ever furnish to nations a compulsory tribunal of reason that will supersede what Lord Bacon calls "the highest trials of right, when princes and states that acknowledge no superior upon earth shall put themselves upon the justice of God for the deciding of their controversies by such success as it shall please Him to give on either side," it has proved to be within the compass of the public reason and justice of the two powerful, enlightened, and kindred nations, parties to this great controversy, to subtract it from the adjudication of "war, the terrible litigation of states." By amicable negotiations which have produced the treaty of Washington, the high contracting parties have reduced their differences to a formal and definite expression and description of the claims for satisfaction and indemnity by Great Britain which the United States insist upon, and that nation contests, and have submitted to the award of this august tribunal the final determination of the same.

The provisions of the treaty of Washington respecting the arbitration.

The Case of the United States sets forth the text of those articles of the treaty of Washington which provide for the constitution of the tribunal of arbitration, and ascertain and state the subject-matter for its jurisdiction, the measure of its powers, and the form and effect of its authorized award. In the full light of the negotiations which led to and attended this consummation, and which are laid before the tribunal, in the Cases and proofs of the contending parties, the arbitrators will find no difficulty in affixing to the terms of the treaty their true and certain meaning.

We desire, by a few observations, to attract the attention of the arbitrators to some principal features of these provisions of the treaty.

Description of the claims.

I. The situation giving occasion to and intended to be met by these provisions of the treaty is described as "differences that have arisen between the Government of the United States and the government of Her Britannic Majesty, and still exist, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the 'Alabama claims.'" The only other recital bearing upon this subject, before the operative provisions of the treaty for the disposition of these differences, is to the effect that "Her Britannic Majesty has authorized her high commissioners and

plenipotentiaries to express in a friendly spirit the regret felt by Her Majesty's government for the escape, under whatever circumstances, of the Alabama and other vessels from British ports, and for the depredations committed by these vessels."

Upon these premises thus recited, and "in order to remove and adjust all complaints and claims on the part of the United States, and to provide for the speedy settlement of such claims," the operative arrangement to that end proceeds in the definite statement that "the high contracting parties agree that all the said claims growing out of acts committed by the aforesaid vessels and generically known as the 'Alabama claims,' shall be referred to a tribunal of arbitration," which this article of the treaty then proceeds to constitute.

II. The sixth article of the treaty imposes certain rules or principles, as the law, accepted by the concurrence of the high contracting parties, according to which the actual matters in difference between them are to be adjudicated by the tribunal; and, accordingly, it is provided that, "in deciding the matters submitted to the arbitrators, they shall be governed by the following three rules, which are agreed upon by the high contracting parties as rules to be taken as applicable to the case, and by such principles of international law, not inconsistent therewith, as the arbitrators shall determine to have been applicable to the case." The article then proceeds to give the text of the rules, which it is not necessary here to repeat.

The rules of the treaty.

The only further instruction in regard to the disposition of the matters submitted to arbitration, under the rules prescribed for their determination, is to be found in the seventh article of the treaty, in its provision that "the said tribunal shall first determine as to each vessel separately whether Great Britain has, by any act or omission, failed to fulfill any of the duties set forth in the foregoing three rules, or recognized by the principles of international law not inconsistent with such rules, and shall certify such fact as to each of the said vessels."

The provisions of Article VII.

Upon this principal determination by the tribunal, it is also provided, in Article VII, that, "in case the tribunal find that Great Britain has failed to fulfill any duty or duties as aforesaid, it may, if it think proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it," and, in the tenth article, that, "in case the tribunal finds that Great Britain has failed to fulfill any duty or duties as aforesaid, and does not award a sum in gross, the high contracting parties agree that a board of assessors shall be appointed to ascertain and determine what claims are valid, and what amount or amounts shall be paid by Great Britain to the United States on account of the liability arising from such failure as to each vessel, according to the extent of such liability as decided by the arbitrators."

The effect of the award that shall be made by the arbitrators under the authority conferred upon them by the treaty, is given by the ninth article, which provides that "the high contracting parties engage to consider the result of the proceedings of the tribunal of arbitration and of the board of assessors, should such board be appointed, as a full, perfect, and final settlement of all the claims hereinbefore referred to; and further engage that every such claim, whether the same may or may not have been presented to the notice of, made, preferred, or laid before the tribunal or board, shall, from and after the conclusion of the proceedings of the tribunal or board, be con-

Effect of an award.

sidered and treated as finally settled, barred, and henceforth inadmissible."

From these arrangements of the treaty, it is apparent:

The measure of indemnity claimed.

(1.) That the high contracting parties have found, (in the public act of the government of Great Britain, expressing the regret of that government for certain occurrences in the past, and in the joint public act of the two governments, by which they agree to observe, "as between themselves in future," the rules established as the law of this arbitration, "and to bring them to the knowledge of other maritime powers, and to invite them to accede to them,") the means of reducing the measure of the complaint and demand for indemnity, insisted upon by the United States, and contested by Great Britain, before this tribunal, to all the claims of the United States "growing out of acts committed by" the described "vessels and generically known as the 'Alabama claims.'"

The claims preferred are national.

(2.) That these claims are all preferred by the United States as a nation against Great Britain as a nation, and are to be so computed and paid, whether awarded as "a sum in gross," under the seventh article of the treaty, or awarded for assessment of amounts, under the tenth article.

The authority of the tribunal absolute for their determination.

(3.) That the authority of the tribunal is absolute and final between the two nations, and comprehensive of all the claims falling within the terms of the submission, "whether the same may or may not have been presented to the notice of, made, preferred, or laid before the tribunal or board of assessors."

Its award will be final.

(4.) That by force of this treaty, and the execution of the jurisdiction it confers upon this tribunal of arbitration, the controversy between the two nations, arising upon the conduct of Great Britain during the late rebellion in the United States, will find its final solution in the award of the arbitrators, and will be forever removed as an occasion of estrangement or disturbance of peace.

III.—GENERAL DISCUSSION OF QUESTIONS OF LAW.

We arrive, now, in sequence of the foregoing exposition of the origin, history, and nature of the pending controversy between the United States and Great Britain, to statement of the reclamations of the American Government against the British, comprised in the Treaty of Washington, and explanation of the grounds of public law on which those reclamations are founded, and in view of which the United States ask the judgment of this High Tribunal.

The principle of these reclamations is fully set forth in the Case and Counter Case submitted by the United States.

But a summary restatement thereof is necessary here in order to give completeness to the present Argument, so that it shall constitute a connected and logical *résumé* of the whole controversy between the two Governments.

Contentions of the United States in regard to the failure of Great Britain to maintain neutrality.

I. The United States maintain, as matter of fact, that the British Government was guilty of want of due diligence, that is, of culpable negligence, in permitting, or in not preventing, the construction, equipment, manning, or arming, of confederate men-of-war or cruisers, in the ports of Great Britain or of the British colonies; that such acts of commission or omission, on the part of the British Government, constituted violation of the international obligations of Great Britain toward the United States, whether she be regarded in the light of the treaty friend of the United States, while the latter were engaged in the suppression of domestic rebellion, or whether in the light of a neutral in relation to two belligerents; that such absence of due diligence on the part of the British Government led to acts of commission or omission, injurious to the United States, on the part of subordinates, as well as of the ministers themselves; and that thus and therefore Great Britain became responsible to the United States for injuries done to them by the operation of such cruisers of the Confederates. That is to say, to adopt in substance the language of the treaty of Washington, the United States maintain as fact—

First, that the British Government did not use due diligence to prevent the fitting out, arming, or equipping within its jurisdiction of every vessel which it had reasonable ground to believe was intended to cruise or carry on war against the United States, and also did not use like diligence to prevent the departure from its jurisdiction of every vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Secondly, that the British Government did permit or suffer the Confederates to make use of its ports or waters as the base of naval operations against the United States, or for the renewal or augmentation of military supplies or arms, or the recruitment of men, for the purpose of war against the United States.

Thirdly, that the British Government did not exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of its aforesaid obligations and duties as respects the United States.

Responsibility resulting from such failure.

II. The United States further maintain that, it appearing as fact that Great Britain did fail to fulfill *all* her duties as aforesaid toward the United States, (Article VII,) thereupon and thereby, in virtue of the Treaty of Washington, and of the express compacts therein contained, Great Britain is *bound* by reason of her liability arising from such failure (Article X) to pay to the United States a sum, in gross or on assessment, for all the reclamations referred to this Tribunal, or such amount or amounts on account of said liability according to the extent thereof as decided by the Tribunal.

Scope of the submission.

III. The United States find, on inspection of the Treaty of Washington, that Great Britain has submitted to this Tribunal "all the said claims" of the United States "growing out of the acts" of the confederate cruisers aforesaid, (Article I,) without limitation, qualification, or restriction; and that, in pursuance of such general submission, this Tribunal is to examine and decide, by the express compact of the treaty, "all questions" which shall be laid before it on the part of the Government of the United States, as well as that of Great Britain. (Article II.)

Meaning of the language, "all claims growing out of the acts of the cruisers."

IV. The United States further find as fact on inspection of the negotiations which preceded the treaty of Washington, that the Secretary of State of the United States declared that the American Government, in rejecting a previous convention, "abandons neither its own claims, nor those of its citizens;"[1] that the claims thus referred to were specifically set forth in a subsequent dispatch of the same minister, as follows:

> The President is not yet prepared to pronounce on the question of the indemnities which he thinks due by Great Britain to individual citizens of the United States for the destruction of their property by rebel cruisers fitted out in the ports of Great Britain.
>
> Nor is he now prepared to speak of the reparation which he thinks due by the British Government for the larger account of the vast *national* injuries it has inflicted on the United States.
>
> Nor does he attempt now to measure the relative effect of the various causes of injury, whether by untimely recognition of belligerency, by suffering the fitting out of rebel cruisers, or by the supply of ships, arms, and munitions of war to the Confederates, or otherwise, in whatever manner.[2]

V. The United States farther find as fact that the President, in his annual message to Congress immediately preceding the conclusion of the Treaty of Washington, and which indeed constituted the inducement thereto, spoke as follows:

> I regret to say that no conclusion has been reached for the adjustment of the claims against Great Britain, growing out of the course adopted by that Government during the rebellion. The cabinet of London, so far as its views have been expressed, does not appear to be willing to concede that Her Majesty's Government was guilty of any negligence, or did or permitted any act during the war by which the United States has just cause of complaint. Our firm and unalterable convictions are directly the reverse. I therefore recommend to Congress to authorize the appointment of a commission to take proof of the amounts and the ownership of these several claims on notice to the representative of Her Majesty at Washington, and that authority be given for the settlement of these claims by the United States, so that the Government shall have the ownership of the private claims, as well as the responsible control of all the demands against Great Britain. It cannot be necessary to add that, whenever Her Majesty's Government shall entertain a desire for a full and friendly adjustment of these claims, the United States will enter upon their consideration with an earnest desire for a conclusion consistent with the honor and dignity of both nations.[3]

[1] Mr. Fish to Mr. Motley, May 15, 1869. Documents annexed to Case of the United States, vol. vi, p. 1.

[2] Mr. Fish to Mr. Motley, September 25, 1869, Documents as above, vol. vi, p. 13. (See the commentary on these national or (so called) indirect damages by Mr. Abbott, in Lord Clarendon's dispatch, in Appendix to the British Case, N. A., No. 1, 1870, p. 19.)

[3] Papers relating to foreign relations of the United States, December 5, 1870, p. 9.

VI. We, the counsel of the United States, insist, therefore, that such, n their magnitude, nature, and scope, are the claims submitted to the Tribunal by the express tenor, the spirit as well as the language, of the treaty of Washington, as particularly set forth in the Case and Counter Case of the United States.

To these reclamations the British Government, in its Case and Counter Case, responds:

First, taking issue with the United States on the question of imputed negligence, or disregard, in other respects, of the rules of public law laid down in the treaty of Washington.

Secondly, alleging as legal theory, that, in the incidents brought under review, the British Government acted in conformity with, and in obedience to, the provisions of a certain act of Parliament, commonly known as the foreign-enlistment act, and that, by the law of nations, or the public law of Great Britain, the obligations of the British government toward the United States are to be measured *in execution* by that act of Parliament.

Thirdly, the British Government, in justification or extenuation of its own imputed delinquencies in the premises, adduces certain incidental considerations, derived from the history and jurisprudence of sundry foreign governments, including the Government of the United States.

VI. As to the first of these points, the counsel of the United States propose to exhibit to the Tribunal a complete and authentic analysis of the great body of pertinent proofs contained in the documents annexed by the two governments to their respective Cases and Counter Cases; and to argue thereon that such documents conclusively establish the main fact of the violation by the British Government of the rules of duty stipulated by the treaty of Washington.

Proposed course of argument.

VII. As to the second and third of said points, the counsel of the United States will in the sequel submit considerations which, as they conceive, conclusively establish the legal rights of the United States in the premises, notwithstanding such defensive arguments as are adduced by the British Government.

VIII. Preparatory to which, we submit to the wisdom of the Tribunal the following general considerations of law applicable to the defense set up by the British Government.

General considerations of law.

1. We maintain, and undertake to prove, that, even if the provisions of the foreign-enlistment act were the measure and limit of the international duties of the British Government in the premises, still, on the facts, there was culpable negligence on the part of Great Britain. The British Government did not do, by way of prevention, or repression, or punishment, all which that act permitted and required.

Great Britain guilty of culpable negligence even when measuring its duties by the foreign-enlistment act.

2. But the international duties of Great Britain are wholly independent of her own municipal law, and the provisions of the above-cited act of Parliament do not rise to the height of the requirements, either of the law of nations or of the rules of the Treaty of Washington. That act makes no *adequate* provision, either of prevention or punishment; and it contains no provision whatever of *executive* prevention, without which no government can discharge its international obligations, or preserve its own international peace.

International duties independent of municipal law.

3. If, as a question of local administration, that act was deficient in powers, it was the international duty of Great Britain, as a government, to pass a new act conferring on its ministers the requisite powers.

Defects of foreign-enlistment act.

4. In the domestic institutions of Great Britain, no constitutional obstacles existed to prevent the enactment of such new act of Parliament; for, to affirm the existence of such obstacles would be to deny to Great Britain the capacity and right to subsist in the family of nations as a co-equal sovereign State.

They might have been remedied.

In fact, Great Britain has since then, in view of political complications on the continent of Europe, enacted a new act of Parliament, such as she ought before to have enacted, and that on the suggestion of the United States.

5. The British Government throughout argues these questions as questions of *neutrality*. We deny that they are such; we deny, as hereinbefore stated, that Great Britain had right to interpose herself as a professed neutral between her treaty ally, the United States, and the rebels of the United States. But we place ourselves, at present and in this relation, on the premises of the defensive argument of the British Government. And, standing on those technical premises, the counsel of the United States maintain that the neutrality of a government, as respects two belligerents, is a question of international, not municipal, resort. Its legal relations are involved in the question of the rights of peace and war.

These are not questions of neutrality.

Hence, to depend upon punitive municipal laws for the maintenance of international neutrality, is itself neglect of neutral duty, which duty demands preventive interposition on the part of the executive power of the State.

6. Great Britain, therefore, on the narrow and inadmissible premises of her own defense, was legally responsible to the United States for the acts of the cruisers in question, whether as for non-execution of her then existing act of Parliament, which was want of due diligence, or for undertaking to depend on that act, which not only involved want of due diligence, but implied refusal to perform the duties of a neutral.

Great Britain legally responsible to United States.

IX. The counsel of the United States will have occasion to refer to some of these points in the sequel, when they come to present, in full and affirmatively, their own views of the international obligations of Great Britain, and of her delinquency in the premises as respects her special obligations toward the United States.

Sir R. Phillimore's authority cited.

Meanwhile, in vindication of the suggestions in this behalf now made by us, we submit to the consideration of the Tribunal appropriate extracts from the great work on "International Law," by Sir Robert Phillimore, of whom it is little to say that, apart from his eminence as a judge and as a statesman, he is *facile princeps* among the authorities of this class in Great Britain.

We cite as follows:

There remains one question of the gravest importance, namely the *responsibility of a state for the* acts of her citizens, involving the duty of a neutral to prevent armaments and ships of war issuing from her shores for the service of a belligerent, though such armaments were furnished and ships were equipped, built, and sent without the knowledge and contrary to the orders of her government.

The question to what extent the state is responsible for the private acts of its subjects (*civitasne deliquerit an cives?*) is one of the most important and interesting parts of the law which governs the relations of independent states.

It is a maxim of general law that, so far as foreign states are concerned, the will of the subject must be considered as bound up in that of his sovereign.

It is also a maxim that each state has a right to expect from another the observance of international obligations, without regard to what may be the municipal means which it possesses for enforcing this observance.

The act of an individual citizen, or of a small number of citizens, is not to be imputed without clear proof to the government of which they are subjects.

A government may by *knowledge* and *sufferance*, as well as by direct *permission*, become responsible for the acts of subjects whom it does not prevent from the commission of an injury to a foreign state.

A government is presumed to be able to restrain the subject within its territory from contravening the obligations of neutrality to which the state is bound.[1]

The government of the owner of the captured property may indeed call the neutral to account for permitting a fraudulent, unworthy, or unnecessary violation of its jurisdiction, and such permission may, according to the circumstances, convert the neutral into a belligerent.[2]

In fact, the maxim adverted to in a former volume of this work is sound, viz, that a state is, *prima facie*, responsible for whatever is done within its jurisdiction; for it must be *presumed* to be capable of preventing or punishing offenses committed within its boundaries. A body-politic is therefore responsible for the acts of individuals, which are acts of actual or meditated hostility toward a nation with which the government of these subjects professes to maintain relations of friendship or neutrality.[3]

The relation of neutrality will be found to consist in two principal circumstances:

1. Entire abstinence from any participation in the war.
2. Impartiality of conduct toward both belligerents.

This *abstinence* and this *impartiality* must be combined in the character of a *bona-fide* neutral.

The *neutral* is justly and happily designated by the Latin expression *in bello medius*. It is of the essence of his character that he so retain this central position as to incline to neither belligerent. He has no *jus bellicum* himself; but he is entitled to the continuance of his ordinary *jus pacis*, with, as will presently be seen, certain curtailments and modifications, which flow from the altered state of the general relations of all countries in time of war. He must do nothing by which the condition of either belligerent may be bettered or strengthened, *quo validior fiat*.

It is for him perpetually to recollect, and practically to act upon, the maxim, "*Hostem esse qui faciat quod hosti placet*."[4]

We do not overstate the point when we say that these texts, from such an authority, but recently published, (1871,) and in full view of the present controversy between the two governments, compose, not only a complete answer to the legal doctrines of the Case and Counter Case of Great Britain in this behalf, but affirmation of the larger premises of argument assumed by the United States.

1. Sir Robert Phillimore avers that, so far as foreign States are concerned, the will of the subject is bound up in that of his sovereign.

Now, among the persons who equipped, manned, and armed the cruisers of the confederates in question, were *liege subjects* of Great Britain.

True it is that these liege subjects of Great Britain were hired to perform the acts in question by rebels of the United States, and the British Government strangely supposes that, because these rebels were citizens of the United States, therefore Great Britain was not responsible for their acts. The argument implies that foreigners in Great Britain are independent of the local jurisdiction. That, of course, is an error. But, if it were otherwise, the British Government would remain responsible for the acts of the Lairds, and all other British subjects, including Prioleau, an American converted into a British subject for the special object of violating the laws of Great Britain, and committing treason against the United States with impunity, under shelter of the flag of Great Britain.

2. Sir Robert Phillimore, at a blow, strikes to the earth the whole fabric of the British Case and Counter Case, in declaring that no government has a right to set up the deficiency of its own municipal law as excuse for the non-performance of international obligations toward a foreign State.

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[1] Phillimore's International Law, vol. i, preface to 2d ed, p. 21.
[2] Phillimore's International Law, vol. iii, p. 228.
[3] Phillimore's International Law, vol. iii, p. 218.
[4] Phillimore's International Law, vol. iii, pp. 201-2.

3. He lays down the rule that a government may by *knowledge* and *sufferance*, as well as by direct *permission*, become responsible for the acts of subjects, (including commorant or transient aliens,) whom *it does not prevent* from committing injury to a foreign State. This proposition is not presented by Sir Robert Phillimore as based on any express treaty stipulation, but as being the doctrine of the law of nations. As such it serves to construe the "due diligence" of the Treaty of Washington.

4. In expounding the proposition of the impartiality requisite in the character of a *bona-fide* neutral, he declares that such neutrality is violated by any act which *betters* or *strengthens* one of the belligerents, or by any act which *gratifies* one of the belligerents.

It needs only to consider the analysis of the facts hereinafter presented, to see how much the British Government did to strengthen and to gratify the rebels of the United States.

5. Finally, he affirms that if a government, professing neutrality, permits a fraudulent, unworthy, or unnecessary violation of its jurisdiction, such permission may, according to the circumstances, *convert the neutral into a belligerent.*

That is the position of the counsel of the United States on this point; and it may be shown by signal examples in the previous history of Great Britain, that she herself has acted on this principle with respect to governments which, professing neutrality, did acts to strengthen or favor belligerent enemies of hers.

Legal theory of the United States respecting questions at issue.

X. We now proceed to develop more distinctly the nature and basis of the legal theory of the United States in regard to the questions at issue between the two governments.

We commence by laying down a series of propositions, which are, as we conceive, axioms or postulates of the public law of Europe and America.

Right to make war.

1. The right to engage in war, and so to become a belligerent, is inherent in the quality of sovereignty.[1]

2. We assume, also, that the right to maintain peace and to stand neutral whilst other sovereigns are belligerent, is inherent in the quality of sovereignty.

Right to give cause for war.

3. As the right of war and peace is inherent in sovereignty, so is the right to give cause of war to another sovereign.

What may be cause.

4. Such cause of war may consist in acts of professed warfare, as the invasion of a foreign country in arms, the reduction of its cities, the military devastation of its territory, the capture of its merchant-vessels, or the armed encounter of its ships of war.

5. Or such cause of war may consist in acts equivalent to professed warfare, as in affording aid to one belligerent against another, such belligerents being each sovereign; or by prematurely conceding the quality of belligerence or of independence to the rebels of another sovereign; or by aiding such rebels in fact, while pretending friendship for their sovereign.

Neutrality.

6. True neutrality between belligerents consists in holding absolutely aloof from the war in fact and in truth, as well as in profession. To profess neutrality, and not to observe it, is disguised war.

War; what it is.

7. War is by land or sea; and war by sea may consist in combats between ships of war, or in the capture of merchant-vessels and their cargoes.

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[1] Vattel, *Droit des gens*, éd. Pradier-Fodéré, tome ii, p. 337, (note.) Cauchy, *Droit maritime*, tome i, p. 18; tome ii, p. 14. Martens, *Droit des gens*, éd. Vergé, tome ii, p. 198.

It is not material to this point that certain of the States of Europe have agreed to abstain from the issue of letters of marque. Even those powers continue to maintain the belligerent right to capture private merchant-vessels and their cargoes, by the agency of men-of-war. The United States have refused to enter into any such agreement, in the conception that it is only adapted to governments which see fit to incur the expense of maintaining a large military marine. The United States have been content to agree with other powers in according immunity from any capture to private property on the sea; but they insist, as they think rightfully, that, if private property is to remain subject to capture, it should be subject to capture by letter of marque as well as by the regular naval forces of the belligerent, letters of marque having the same relation to regular forces in war on the sea, as volunteer levies have to the regular forces in war on land.[1]

8. The law of nations, as now practiced, permits the sale of arms by private merchants of the neutral sovereign, and their exportation and transportation for the use of the belligerent, subject to capture as contraband of war,[2] although the tendency of modern opinion is to contend that such acts of sale are contrary to the true principles of neutrality.

Sales of arms and contraband of war.

Many of the modern regulations of different governments on the subject of neutrality, contained in the documents annexed to the American Counter Case, sustain this view. (See the dispatch of Lord Granville to the Prussian minister of October 21, 1870, on the subject, defending the right of such sales.[3])

But it is admitted universally, in theory as well as in practice, that international law does not permit the equipment of men-of-war, or letters of marque, or their re-armament, or the enlistment of men for the military marine of the belligerent, in the ports of the neutral.

9. The pretended neutral, who, as a government, expedites vessels, or with culpable negligence permits the expedition of vessels from his ports, to cruise against one of the belligerents, becomes thereby belligerent in fact, and responsible as such to the injured belligerent.

Dispatch of armed vessels.

10. In questions of international peace or war, and in all which regards foreign States, the will of the subject (or of commorant aliens) is merged in that of the local sovereign; that sovereign is responsible if he permits or knowingly suffers his subjects (or commorant aliens) to perpetrate injury to a foreign State; and, apart from other and direct proofs of permission, or knowledge and sufferance, the responsibility for any injury is fixed on such sovereign, if he depend on municipal means of enforcing the observance of international obligations, instead of acting preventively to that end in his prerogative capacity as sovereign.

Responsibility of sovereign for violation of neutrality.

11. It is not admissible for any sovereign to plead constitutional difficulties in such an emergency; to do which implies surrender of the rights, as well as abnegation of the power, of a sovereign, and confers on the injured power the right to occupy by force the territory of the incompetent power, and

Constitutional inabilities cannot be pleaded in answer to a charge of such violation.

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[1] See Cauchy, *Droit maritime*, tome ii, pp. 374 and 404. *Idem*, Du respect de la propriété privée dans la guerre maritime, *passim*.

[2] Bynkershoek, *Quæstiones Juris Publici*, l. i, c. 22. The *"Santissima Trinidad,"* Wheaton's Reports, vol. vii, p. 340. Phillimore, vol. iii, p. 321. Pistoye et Duverdy, *Traité des prises maritimes*, t. i, p. 394.

[3] Documents with the message of President of the United States, December, 1870.

to impose upon his subjects that preservation of order which he professes constitutional inability to preserve.

"*Culpâ caret, qui scit, sed prohibere non potest*" is indeed one of the rules of private right; "but," says Sir Robert Phillimore, "such an avowal, actual or constructive, on the part of the unintentionally injuring State, justifies the injured State in exercising, if it can, that jurisdiction by foreign force, which ought to be, but cannot be, exercised by domestic law."[1]

12. But no independent State exists, either in Europe or America, encumbered with constitutional incapacity in this respect.

Violations of neutrality are issues of war and peace. Whatever power in a state declares war, or makes peace, has jurisdiction of the issues of peace and war, including, of course, all violations of neutrality.

In point of fact, such authority is not a quality of despotic government only: it belongs equally to the most constitutional government, as appears, for instance, in the political institutions of constitutional republics, like Switzerland and the United States, and in constitutional monarchies, like Italy and Brazil.[2]

The counsel of the United States submit these propositions as undeniable and elementary truths.

Yet the Case and Counter Case of the British Government assume and persistently argue that the sole instrument possessed by the British Government to enforce the performance of neutral obligations at the time of the occurrences in question, was a particular act of the British Parliament.

Every government in Europe or America, except Great Britain, asserts and exercises authority to prevent its liege subjects (and *à fortiori* commorant aliens) from doing acts which tend to involve it in a war with any other government.

But the British Government maintains that the sovereign State of Great Britain and Ireland, the imperial mistress of the Indies, the proudest in fame, the richest in resources, and (including her transmarine possessions) the most populous of the great States of Europe, does not possess constitutional power to prevent mercenary law-breakers among her own subjects, or bands of desperate foreign rebels, commorant on her soil, from dragging her into acts of flagrant violation of neutrality, and thus affording, or tending to afford, just cause of war to other foreign States.

And such is the defense of Great Britain in answer to the reclamations of the United States.

13. It would be difficult to find any other example of a great State defending itself against charges of wrong by setting up the plea of its constitutional incompetency and incapacity to discharge the most commonplace duties of a sovereign State.

Alleged constitutional inability of Great Britain examined.

Great Britain is not in that condition of constitutional disability which her ministers pretend.

We find, on the most cursory observation of the constitution of Great Britain, that the declaration of war, the conclusion of peace, the conduct of foreign affairs—that all these things are in Great Britain elements of the prerogative of the Crown.

We cannot believe and do not concede that in all these greater prerogative powers there is not included the lesser one of *preventing* unauthorized private persons from engaging in private war against a friendly

[1] Phillimore's International Law, vol. iii, p. 218.

[2] See Appendix to the American Counter Case, cited or commented on hereafter.

foreign State, and thus committing Great Britain to causes of public war on the part of such foreign State.

If the exercise of such power by the Crown involves derogation of the rights of private persons which ministers fear to commit, they should obtain a proper act of Parliament, either for antecedent general authorization or for subsequent protection, all which is within the scope of the theoretic omnipotence of Parliament. The British ministers do not scruple to suspend the privileges of the writ of *habeas corpus*, whether with or without previous parliamentary authorization, and whether in the United Kingdom or in the Colonies, on occasion of petty acts of rebellion or revolt, that is, the case of *domestic war: à fortiori* they should and may arrest and prevent subjects or commorant foreigners engaged in the commission of acts of foreign war to the prejudice of another government.

Is it possible to deny or to doubt that British ministers might as well do this as the ministers of Switzerland, Italy, Brazil, and the United States, in like circumstances?

Has the Queen of the United Kingdom of Great Britain and Ireland less executive power than the President of the United States? And if she have less, could not the deficient power be granted to her by act of Parliament, just as readily as similar executive power, in this relation, has been granted to the President of the United States by their Congress?

14. But there is no such deficiency of power in the British ministers; their own conduct in pertinent cases proves conclusively that they have the power, and can exercise it, when they choose, without affording occasion of any serious doubt or denial of the constitutionality of their acts.

Be it remembered that the excuse of the British Government, for omitting to detain the Alabama and other confederate cruisers, was the alleged want of power to act outside of the foreign-enlistment act.

And yet, subsequently to the escape of the Alabama from the port of Liverpool, on occasion of the construction in the ports of Great Britain of certain other vessels for the confederates, commonly spoken of as the Laird rams, the British Government seized them upon its own responsibility in virtue of the prerogative power of the Crown, and so prevented their departure to make war against the United States.

And what the ministers did on this occasion was fully justified in the House of Commons by Sir Roundell Palmer, the then attorney-general of Great Britain, in the following words:

> I do not hesitate to say boldly, and in the face of the country, that the government *on their own responsibility* detained them. They were prosecuting inquiries which, though imperfect, left on the mind of the government strong reasons for believing that the result might prove to be that these ships were intended for an illegal purpose, and that if they left the country the law would be violated and a great injury done to a friendly power. The government did not seize the ships; they did not by any act take possession or interfere with them, but on their own responsibility they gave notice to the parties interested that the law should not be evaded until the pending inquiry should be brought to a conclusion, when the government would know whether the inquiry would result in affording conclusive grounds for seizing the ships or not. If any other great crime or mischief were in progress, could it be doubted that the government would be justified in taking steps to prevent the evasion from justice of the person whose conduct was under investigation until the completion of the inquiry? In a criminal case we know that it is an ordinary course to go before a magistrate, and some information is taken of a most imperfect character to justify the accused's committal to prison for trial, the prisoner being remanded from time to time. And that course cannot be adopted in cases of seizing of vessels of this description; the law gives no means for that. And therefore it is that the government, on their own responsibility, must act and have acted in determining that what had taken place with

regard to the Alabama should not take place with respect to these ships, that they should not slip out of the Mersey and join the navy of the belligerent powers, contrary to our law, if that were the intention, until the inquiry in progress should be so far brought to a conclusion as to enable the government to judge whether the ships were really intended for innocent purposes or not.

The government were determined that the inquiries which they were making should be brought to a legitimate conclusion, that it might be seen whether those inquiries resulted in evidence or not of the vessels being intended for the confederates, and that in the mean time they would not permit the ends of justice to be baffled by the sudden removal of the ships from the river.

It is impossible that the case of the government can now be brought before the house; but the government have acted under a serious sense of their duty to themselves, to Her Majesty, *to our allies in the United States, and to every other nation with whom Her Majesty is in friendship and alliance, and with whom questions of this kind may be liable hereafter to arise.* Under a sense of that duty they have felt that this is not a question to be treated lightly, or as one of no great importance. If an evasion of the statute law of the land was really about to take place, it was the duty of the government to use all possible means to ascertain the truth, and to prevent the escape of vessels of this kind to be used against a friendly power. It was their duty to make inquiries, and to act if there was a good ground for seizure, taking care only to adopt that procedure which was justified by the circumstances.[1]

And well might Sir Hugh Cairns say, on that occasion, to the British minister: "Either our Government must contend that what they did in September (that is, in the matter of the Laird rams) was unconstitutional, or they ought to have done the same with regard to the Alabama, *and are liable.*"

But in truth these extraordinary professions of impotency, on the part of the British Government, are but additional proofs of the negligent spirit of that government in permitting or not preventing the expedition of the Alabama and other vessels, and the perilous consequences of which they had come to appreciate and to shrink from at the time of the arrest of the Laird rams.

15. There is another pertinent example in the modern history of Great Britain of the power of her ministers to arrest such expeditions when they have the desire.

We allude to the celebrated affair of the so-called Terceira expedition.

During the pendency of the civil war in Portugal on occasion of the disputed succession between Donna Maria and Don Miguel, certain Portuguese refugees, partisans of Donna Maria, sailed from England in transports ostensibly destined for Brazil, but, as was suspected, intended for Terceira, in the Azores. It was not pretended that the transports were fitted for war, and the Portuguese on board were unarmed. Nevertheless, the British ministers conceived that the expedition was one in violation of the neutrality of Great Britain.

Whereupon, they dispatched a naval force to pursue these vessels, and to prevent the persons on board from landing, either at Terceira, or at any one of the Western Islands; which was done, and the Portuguese were compelled to leave the waters of the Azores, and to take refuge in France.

It is to be noted that this act of force by Great Britain in the maintenance of her neutrality was done, not in the ports of Great Britain, or in her waters, but on the high seas, or rather within the waters of the Western Islands, and in the actual jurisdiction of a sovereign to whom the Portuguese in question professed and owed allegiance; for Terceira then acknowledged the power of Donna Maria.

No pretense existed here of action in subordination to the forms of the foreign-enlistment act, or any other act of Parliament. What was done, was done simply in virtue of the prerogative power of the Crown.

[1] Documents annexed to the American Case, vol. v, p. 477.

The conduct of the ministers in this affair was earnestly discussed in both houses of Parliament, and was approved by both houses.

But it is remarkable, and pertinent to the present controversy, that neither in the House of Lords nor in the House of Commons was it maintained that the ministers had on this occasion overstepped the limits of *the constitution of Great Britain.*

The objection was, that the British Government had itself committed a breach of neutrality, in undertaking to intercept the transports on the high seas, or within the legitimate jurisdiction of one of the belligerents; and that the act was a violation of the sovereignty of the State to which the island of Terceira belonged.

We respectfully submit to this high Tribunal whether it is not idle to pretend that British ministers, possessing the constitutional power to pursue and arrest the Terceira expedition even on the high seas, for violating the neutrality of Great Britain, have no power to prevent, even within the ports of Great Britain, the expedition of men-of-war against the United States.[1] In fine, the British ministers, it is impossible to doubt, had the same constitutional power to arrest and detain the Alabama in the ports of Great Britain, imperial or colonial, as they had to arrest there the Laird rams; and they had the same constitutional power to arrest the Alabama, Florida, Georgia, and other confederate cruisers on the high seas, as they had to arrest there the Terceira expedition.

16. And the existence of this constitutional executive power serves to explain, what otherwise would be to the last degree inconceivable, that is to say, the omission, in the British foreign-enlistment act of 1819, to provide for executive action, as was done in the American foreign-enlistment act. The prerogative power of the Crown.

In the United States, it was necessary to impart such executive powers to the President, because, according to the tenor of our Constitution, it does not belong to the President to declare war, nor has he final and complete jurisdiction of foreign affairs. In all that, he must act by the authority, or with the concurrence, as the case may be, of the Congress, or of the Senate.

In Great Britain, on the contrary, it appertains to the prerogative power of the Crown to declare war and to make treaties, either of belligerent alliance or of peace; and, how much soever in practice it may be customary for ministers to communicate with Parliament on these questions, it is not the less true that, constitutionally speaking, the prerogative power resides in the Crown.

17. The affirmative resolution of the British ministers to call this prerogative power into action for the sole purpose of elevating the rebels of the United States into the dignity of belligerents on a level with their own sovereign, and thus converting piratical cruisers into legitimate cruisers, and the negative resolution of the British ministers, in refusing to call into play the prerogative of the Crown, in order to give effect to their own professions of neutrality, injurious as even such professions were to the United States, in undertaking to place them and their rebels in the same category of international rights,—these two resolutions rendered it possible, as it would not otherwise have been, for the confederates to fit out cruisers in the ports of Great Britain: whereupon ensues responsibility of Great Britain for acts of the Confederates, in which, by false theory of action and negligence in fact combined, she participated to the prejudice of the United States.

[1] See the facts of the Terceira expedition, Phillimore's International Law, vol. iii, p. 229.

IV.—MISCELLANEOUS CONSIDERATIONS.

Many irrelevant matters in the British Case and Counter Case.

The British Case and Counter Case are largely occupied with matters which are secondary, immaterial, not to say totally irrelevant, in the judgment of the counsel of the United States, but which, being seriously presented by the British Government, seem to require attention.

Its treatment of the British foreign-enlistment act of 1819.

I. Much is said on the subject of the British foreign-enlistment act of 1819, of its assumed adequacy, of its value relatively to the similar acts of the United States, and of the comparative legislation, in this respect, of Great Britain and of other European States.

All such considerations would seem to be foreign to the subject and beneath its dignity, when it is considered that laws of this nature, how much soever they may be locally convenient, yet do not serve to determine the duties of neutrality in the international relation of governments.

It is quite vain for the British Government to assert the sufficiency of the foreign-enlistment act of 1819. Its practical inefficiency was glaringly apparent on the face of all the relative diplomatic correspondence between Great Britain and the United States. The same insufficiency manifested itself in the legal proceedings in the case of the Alexandra in such degree as to throw contempt and ridicule upon the whole act. Quibbles of verbal criticism, fit only for insignificant things of mere domestic concernment, pervaded the opinions of the great judges of England in a matter closely affecting her international honor and foreign peace. It needs only to read the report of this trial to see how absurd is the hypothesis of the English Case and Counter Case, in arguing, that any question of peace and war, between Great Britain and other governments is to be determined according to the provisions of that act, and that in such a transcendent question the British ministers are under the necessity of floundering along in the flat morass of the meaningless verbosity and confused circumlocution of any act of Parliament. Well may Sir Robert Phillimore speak of "its loose phraseology and disjointed sentences."[1] Well might Baron Channell say of the language of the act, "more imperfect or faulty wording I can scarcely conceive."[2] We cannot understand by what strange perversion of reason it is that the British Government continues to maintain that its ministers were compelled to drift into the condition of foreign war rather than break free from the entanglement of the cobweb meshes of that act.

But, in fact, its inefficiency has been unequivocally admitted by the enactment, on the part of Great Britain, of the foreign-enlistment act of 1870, and by the official inquiry which preceded the passage of that act.

Its comparison between the British and American acts unjust.

II. With similar sacrifice of the principal to the incident, and of the large to the minute, the British Government insists that the British act of 1819 is equal in efficiency to the American act of 1818. It is strange enough that the British Govern-

[1] International Law, vol. i, p. 466.

[2] Documents annexed to American Case, vol. v, p. 440.

ment should make this suggestion in the presence of the documents contained in the appendix to the British Case, in which appears the report of the British minister at Washington, Sir Frederick Bruce, on the subject of the foreign-enlistment act of the United States, pointing out in detail the plain superiority of the American to the British act.[1]

The great difference between the two consists in the cardinal fact that the provisions of the British act are merely *punitive*, and to be carried into effect only by judicial instrumentality; whereas the American act is preventive, calls for executive action, and places in the hands of the President of the United States the entire military and naval force of the Government, to be employed by him, in his discretion, for the prevention of foreign equipments and foreign enlistments in the United States.

Thus deficient, the British act was valueless, except as, if occasion should arise, to make it serve as a pretext to cover, in diplomatic communication with other governments, indifferent, unfriendly, or hostile *animus* on the part of some British minister. In other respects, however, that is to say, in the narrow limits of its own theory of municipal legislation, the British act is utterly inferior to the American act. Sir Frederick Bruce clearly shows the numerous traits of superiority in the American act.[2]

Thus, in the United States, the Government not only derives aid in the administration of the law from the officers of the customs, who in Great Britain are the sole dependence in this respect, but it has local officers in the principal ports, both administrative and executive, whose action it commands; it may impose bonds of good behavior on the owner of suspected vessels; informers are entitled to a share of forfeitures, and the judicial proceedings have advantages not to be found in the British act.

All these things are trivial when considered in relation to the great international questions of neutrality, and of peace or war. But we are compelled to discuss such trivialities by the extraordinary persistence of the British Government in basing its defense on the very defects of its act of Parliament.

III. Of these differences between the American and the British acts, and of the singular deficiencies of the British act, the explanation is at hand. It is to be found in what English writers themselves delicately describe as the *prejudices* of Great Britain, or which can better be described as indisposition to appreciate fully the rights of other governments.

The Government of the United States has always been anxious to possess legislative powers sufficient for the performance of its duties as a neutral.

The United States encountered the question of their own right of sovereignty in the matter of foreign equipments and foreign enlistments, and the relation of that matter to their own peace and the rights of other governments, at the very commencement of their career as a sovereign State. They were placed, at the very outset, in presence of the state of universal warfare produced by the French revolution, being exposed especially to the extreme exigencies of France and of England. They adopted a foreign policy of peace and neutrality. They determined, if possible, not to be drawn into the vortex of war, which had swallowed up Europe and all European America. The Case of the United States has related with fidelity and with all due amplitude the measures, administrative and legislative, adopted by the American Government, under

[1] Appendix to the British Case, vol. iii, p. 67.

[2] Lord Clarendon, says Mr. Buchanan, in one of his dispatches, referred to our neutrality law of April 20, 1818, in terms of high commendation, and pronounced it superior to their own, *especially in regard to privateers*. (App. Am. Case, vol. iv, p. 69.)

the inspiration of President Washington, to maintain the rights of neutrality, in spite of aggression on both sides, which at length compelled the United States, in the defense of its neutrality, to encounter even war, first with France and afterward with Great Britain.[1]

Among these measures was the enactment of that act for the prevention of foreign enlistments and naval equipments, which, in all the steps of the present controversy, the British Governme nt itself cannot refuse to honor and applaud, and which in the process of time it imitated in its own domestic legislation.

The American Government, sincerely professing neutrality, spared no honorable steps to give effect to its professions and to demonstrate its good faith. Of its own initiation it amended its legislation, when defects therein became apparent to its observation; and it willingly accepted suggestions of amendment from friendly and unfriendly foreign powers. And it has steadily adhered to the doctrine of that legislation.

The American Government has introduced such amendments more than once at the suggestion of Great Britain, not deeming it wise in the sense of its own interests, or just toward other governments, to stand obstinately, as Great Britain has done in like circumstances, on confessedly defective legislation of neutrality, and scorning to pretend that to do justice to such suggestion would be in derogation of the sovereign dignity of the United States.

The British Government alleges that on a recent occasion the American *Government* indicated purpose to repeal or materially weaken its foreign-enlistment act. That is an error. Every member of the Congress of the United States has the right to initiate measures of legislation. No exclusive right in this respect belongs to the President, (that is, the executive Government.) The President of the United States has not proposed the repeal or the diminution of the American neutrality act. A member of the House of Representatives did propose some amendments to that act tending to weaken its force; but his proposition was not inspired by the Executive, and was not adopted by Congress.

Not only in its legislative measures, but in its diplomatic intercourse with other governments, the United States diligently and sedulously pursue the policy of neutral right, and especially the immunity of the ocean, by exerting themselves on all fit occasions to introduce these principles into its treaties with other governments. D. Carlos Calvo calls attention to a "curious document" published by the minister of marine of the French Empire, in 1854, which enumerates some, but not all, of the treaty stipulations of this class initiated by the United States.[2]

We find this document in Pistoye et Duverdy's *Traité des prises maritimes*, tome ii, p. 492, and cite some portions of it to show the estimation in which the neutral faith and the neutral diligence of the United States have been held in France:

Les journaux de France et d'Angleterre (says the document,) d'après ceux des États-Unis d'Amérique, parlent d'officiers russes envoyés à New York avec la mission ostensible de surveiller la construction de bâtiments à hélice pour le compte de leur gouvernement; mais en réalité, afin d'organiser dans les ports de l'union, au moyen de lettres de marque délivrées au nom du gouvernement russe aux citoyens américains, des armements en course contre le commerce français et anglais pendant la guerre devenue imminente entre la France et l'Angleterre d'une part, et la Russie de l'autre. Le Morning Post rappelait récemment, à ce sujet que le droit conventionnel et la législation des États-Unis leur faisaient un devoir d'empêcher, et, au besoin, de punir de tels actes d'hostilité contre le pavillon d'une puissance en paix avec l'union. Ce journal citait même quelques traités dans lesquels l'acceptation que des citoyens américains feraient de lettres de marque étrangères pour courir sus aux navires de la puissance cosignataire, est assimilée à la piraterie et rendue passible du même traitement. On va donner

[1] Cauchy, *Droit maritime*, tome ii, p. 236 *et seq.*

[2] See Calvo's *Derecho Internacional*, tome ii, p. 181.

ici la nomenclature, aussi complète que possible, des conventions conclues par les États-Unis, et dans lesquels ce principe a été formellement consacré.

The document then refers to the American foreign-enlistment acts, and continues:

Le gouvernement américain a déjà eu l'occasion de montrer qu'il était décidé à remplir loyalement les obligations internationales qui lui sont imposées par cette législation. En 1838, lors du blocus des ports du Mexique et de la République Argentine par nos forces navales, le ministère de France, à Washington, ayant eu lieu de craindre qu'on armât dans les ports de l'union des corsaires munis de lettres de marque des gouvernements du Mexique et de Buenos-Ayres pour courir sus aux navires français, avait appelé sur cet objet l'attention du cabinet américain. Le secrétaire d'État, M. Forsyth, lui donna l'assurance que de tels armements, s'il s'en faisait, ne seraient point tolérés.

C'est à quoi le gouvernment fédéral ne se croirait sans doute pas moins essentiellement obligé, si l'on tentait aujourd'hui d'organiser, dans les ports américains, un système de course, sous pavillon russe, contre le commerce de la France et de l'Angleterre. Il suffisait, tout porte à le croire, de signaler de semblables projets à sa vigilance, pour qu'il s'empressât de prendre des mesures aussi promptes qu'efficaces, dans le but d'assurer la complète exécution des lois en vigueur. Le gouvernmet qui, en 1823, proposait à l'Angleterre et à la Russie de conclure une convention pour déterminer, sur les bases les plus libérales, les droits des neutres en temps de guerre, et notamment pour la suppression de la course maritime, acte dont la France venait de prendre l'initiative à l'occasion de la guerre d'Espagne, ce gouvernement-là, disons-nous, ne peut qu'être disposé à conformer, en ce qui dépendra de lui, sa politique et sa conduite au sentiment honorable qui le portait alors à considérer comme opportun de "revendiquer et rehabiliter les lois de l'équité naturelle, et d'étendre en mer l'influence bienfaisante des préceptes de la charité chrétienne." (Note adressée par M. Middleton, ministre des États-Unis, à Saint Pétersbourg, au comte de Nesselrode, le 5 décembre, 1823.)

Disinclination of Parliament to legislate on the subject.

IV. In singular contrast with this policy of the United States has been the policy of Great Britain. She, one of the oldest maritime states of Europe, had no legislative prohibitions of private maritime equipment for hostile purposes, until long after such legislation existed in the United States. How did this happen? We may conceive the reasons of this, when we reflect upon the numerous piratical enterprises fitted out in former times in ports of Great Britain against the possessions of Spain in America, and the honor accorded to the chiefs of those expeditions, such as Drake and Hawkins; and when we reflect further that British legislation, in this respect, only commenced when most of the Spanish colonies in America had made themselves independent of Spain.

But, even then, it required all the official and personal authority of Mr. Canning, and of the government of which he was a member, to overcome the *vis inertiæ* of the prejudices in this relation so deeply rooted in the mind of Great Britain.

In reading the debates in the British Parliament on occasion of the passage of the act of 1819, it is notable, first, that the opposition to the enactment seemed to be absolutely unconscious of all those principles of international morality involved in the question; and secondly, that the opposition seemed incapable of looking beyond Spain and Spanish America, taking no thought of the duties of Great Britain toward other governments of Europe, and toward the United States.[1]

It is most interesting to see how, on this occasion, Mr. Canning towered above the other debaters, what clear perception he exhibited of the philosophy of the question, and what distinct knowledge of the true principles of international law, in contrast with the shallow arguments of even so eminent a person as Sir James Mackintosh.

Four years afterward the debate was resumed in Parliament, on a motion made by Lord Althorpe for the repeal of the foreign-enlistment act. On that occasion Mr. Canning again distinguished himself by the courage, the eloquence, the statesmanship, and the elevation of view, with which he combated the prejudices of his countrymen. He referred

[1] See Hansard's Parliamentary Debates, vol. xl, *passim*.

to the United States in language which every American may read with pride, and which is pertinent to the present line of observation on the part of the counsel of the American Government.

And, unfortunately for the good understanding of Great Britain and the United States, the British Government is not yet fully emancipated from servitude to the traditional national prejudices which obstructed Mr. Canning. For, as the Case and Counter Case of the British Government show, it still lags behind the United States in appreciation of the true principles of public law, which lie at the foundation of the relations of independent sovereign States.

Legislation of other countries.

V. The British Case, in strange misapprehension of the facts, assumes that municipal laws for the preservation of neutrality exist only in the United States and Great Britain. Meanwhile the report of the English neutrality laws commission, contained in the appendix to the British Case, exhibits in detail the legislation of this class adopted by most of the governments of Europe.

In the British Counter Case, it is true, the foreign laws of this class are at length recognized, but with refinements of imaginary distinction, which tend to leave some doubt in the mind whether the Counter Case does, or does not, admit the error of the Case. The Counter Case does not seem, even now, to see clearly that all these laws, whatever be the diversity of form or of nomenclature among them, are pervaded by one identical idea, namely, the prevention as well as punishment of acts of private persons, such as the enlistment of soldiers or mariners, or the expedition of men-of-war, or of letters-of-marque, in derogation of the local sovereignty, and tending to involve the local government in war with other governments.

Distinction between preventions and punishment.

Sir Robert Phillimore, himself a member of the commission, expresses the identity of theory and object in this relation between the laws of the United States and Great Britain, and those of other governments, as follows: "It appeared from evidence laid before the English neutrality laws commission, appointed by the Queen in 1867, (the recommendations of whose report are mainly incorporated in the present and recent statute,) that European States generally were furnished by their municipal law with the means of fulfilling their international obligations in this respect." [1]

But the indirect or implied retraction in the British Counter Case does not relieve us from the necessity of examining the legislation of other governments, and their executive action in the premises, because that examination will show that the general conscience of the world rejects the theory of the British Government, and conforms to that of the United States.

France.

(*a*) We commence with scrutiny of the actual legislation of France, because that legislation is the model of the modern legislation, in this respect, of many other governments.

The provision of the French Code Pénal is as follows:

ARTICLE 84. Quiconque aura, par des actes non approuvés par le gouvernement, exposé l'état à une déclaration de guerre, sera puni du bannissement; et, si la guerre s'en est suivie, de la déportation.

ARTICLE 85. Quiconque aura, par des actes non approuvés par le gouvernement, exposé des Français à éprouver des représailles, sera puni du bannissement.

The general commentaries we make on these two articles will apply to similar provisions of law of other governments.

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[1] International Law, vol. i, p. 467.

To the casual reader of them the first idea which suggests itself is their brevity, as compared with corresponding legislation of Great Britain and the United States.

But careful examination shows that they express in plain language the true object and theory of all such laws, which is to punish private persons who undertake acts of war by land and sea, in derogation of the sovereignty and in prejudice of the peace of their country; and that they do it effectually, but in terms of equal terseness and precision.

On the other hand, the English acts are so overloaded with a mass of phrases, alike unprecise and confused, with so much of tedious superfluity of immaterial circumstances, as if they were specially designed to give scope to bar chicanery, to facilitate the escape of offenders, and to embarrass and confound the officers of the government charged with the administration of law. Such indeed has been the ordinary complexion of the legislation of Great Britain, and this style of complex verbosity of legislation has unhappily been transmitted to the United States, although there it begins to encounter steady efforts of reformation, which are conspicuous in the legislation of many of the American States.

These are secondary considerations, however. The important point is, that neither the administrative nor the judicial functionaries of France, nor her legislators and statesmen, ever conceived that the provisions of her penal code were anything more than what they profess to be, namely, the means of punishing the crimes of private persons. Statesmen and legislators of France never imagined that these provisions of the penal code are the measure and limit of her soverign rights or of her sovereign duties. Incidentally those provisions may come in aid of executive action. But to punish individual wrong-doers does not prevent wrong-doing, save incidentally by admonition and example. Punitive legislation is one thing, preventive another; and the only effectual prevention of the wrongful acts of private persons, which tend to compromise the neutrality of a Government, is the summary act of forcible prevention of such deeds by the supreme authority of the Government. Such is the theory of the laws of France in this behalf, as it is of the laws of the United States.[1]

This appreciation of the articles of the French Code Pénal is confirmed by authoritative commentaries thereon, some of which are reproduced in the documents annexed to the American Counter Case.

Accordingly, it is to be remembered that no cruisers sailed from the ports of France to depredate, under the Confederate flag, on the commerce of the United States.

At the very commencement, all Frenchmen were forbidden by sovereign act "to take a commission from either of the two parties to arm vessels of war, or to accept letters of marque for a cruise, or to assist in any manner in the equipment or armament of a war-vessel, or privateer, of either of the belligerents."[2]

And when attempts were made by the Confederates to construct and equip cruisers in the ports of France, on complaint being made by the minister of the United States, the construction of these vessels was arrested; and when a builder professed that vessels under construction, with suspicion of being intended for the Confederates, were in fact intended for a neutral government, the French ministers required proof of such professed honest intention, and carefully watched the vessels to make sure that they should not go into the service of the Confederates.

[1] See documents annexed to the American Counter Case, pages 603 *et seq.*
[2] See Documents, *ubi supra*, p. 912.

On this point we quote the language of the minister of marine, as follows:

> The vessels of war to which you have called our attention shall not leave the ports of France until it shall have been positively demonstrated that their destination does not affect the principles of neutrality, which the French Government wishes to rigidly observe toward both belligerents.[1]

Contrast this with the conduct of the British Government in like circumstances, as exhibited in the analysis of facts comprised in the present Argument, where it is shown with what incredible credulity the British Government accepted the false and deceptive statements of the criminal and mercenary ship-builders engaged in the violation or evasion of the laws of Great Britain.

It requires exercise of much candor to believe that the British ministers could have permitted themselves to be so grossly imposed upon, if they desired to know the truth. Had they done what the French Government did in like circumstances—if they had required the known tools of Confederates at Liverpool, as might well have been done in virtue of the provisions of the merchant shipping act, and, indeed, of the foreign-enlistment act, to make proof of pretended honesty of purpose,—the present controversy between the two Governments might not ever have arisen.

In like manner the conduct of France, regarding the remanning of Confederate cruisers in her ports, is in striking contrast with the conduct of the British Government in reference to the same subject-matter.

Italy. (*b*) All the observations regarding the legislation of France apply, in substance, to the legislation of Italy,[2] and the regulations of the Government of Italy, including circulars of the minister of marine, and decrees of the King, all with distinct reference to the present controversy, are comprehensive, definite, and explicit in preventing, as they did prevent, any attempt of the Confederates to fit out cruisers in the ports of Italy, to abuse the right of asylum, or to cruise therefrom against the commerce of the United States.

All these measures, in form and effect, assumed preventive action by the executive, independently of the penal provisions of the municipal laws of Italy.[3]

The universality of laws of this class in the various countries of Europe is indicated by recent Italian juridical writers.[4]

Switzerland. (*c*) In like manner, examination of the laws, regulations, and political action of Switzerland, in the matter of neutrality, shows their conformity in theory with that of the United States, and emphatically contradicts that of Great Britain.

The *Code pénal fédéral* of Switzerland is in this respect more concise and comprehensive even than that of France, for it inflicts punishment on all persons guilty in Switerland of committing any act contrary to the law of nations.[5]

Various ordinances of the Federal Council contain the most stringent provisions for the maintenance of the neutrality of the republic.[6]

A federal law of Switzerland regulates in the fullest manner, and with all proper restrictions, the enlistment of troops in the territory of the

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[1] See Documents, *ubi supra*, p. 912.
[2] Documents as above, p. 949.
[3] See Documents annexed to the American Case, vol. iv, p. 150 *et seq.*
[4] See Ferrarotti, *Commentario del codice penale*, vol. i, pp. 261–2; and Castelleri, *Legislazioni comparate*, p. 284.
[5] Document annexed to the American Counter Case, p. 1092.
[6] *Ubi supra*, p. 1105.

republic for foreign service, providing that it shall not be done without the express permission of the government; and various official reports demonstrate the active efficiency of the federal government in defending its neutrality, not merely by municipal laws, to be executed by the courts, but by the most complete executive action supported by the military force of the republic.[1]

(*d*) Similar conclusions apply to the legislation and the administrative action of the empire of Brazil: in considering which it will be convenient also to refer to the legislation and administrative action of Portugal, because of the similarity of their laws, and the more or less of common commentary thereon by juridical writers in one country or the other, of eminence and authority. Brazil.

The penal code of Portugal in this respect is substantially the same as that of France.[2] Portugal.

That of Brazil, while comprehending the same idea, is more complete in its development.

By that code it is a crime on the part of any individual to "provoke directly and by acts a foreign nation to declare war against the empire," or "if in case no declaration of war take place, but in consequence of such provocation there should be necessity for any sacrifice on the part of Brazil, or prejudice of her integrity, dignity, or interests."

By that code it is also made a crime to "commit, without order or authority of the government, hostilities against the subjects of another nation, so as to compromise peace, or provoke reprisals."

Furthermore it is declared to be piracy "to practice on the sea any act of depredation or violence, whether against Brazilians, or against foreigners with whom Brazil is not in a state of war."[3]

Both in Brazil and Portugal these provisions of the penal code are but incidental only to the executive action, which prevents by supreme authority any violation of their neutrality, either by subjects or by foreigners.

We beg leave to refer this high tribunal to the administrative regulations of the Brazilian Empire, for the enforcement of neutrality in all the ports of the Empire, in the amplest manner, by efficient action on the part of the imperial ministers, and of the provincial presidents.[4]

In the American Case, and the documents to which it refers, there is sufficient indication of the loyalty and efficiency with which the Brazilian Government maintained its sovereignty against the aggressive efforts of the Confederates.[5]

As to Portugal, we refer to the correspondence annexed to the American Counter Case, to show that she also never pretended that her neutral duty was confined to the execution of the provisions of her penal code. She also put forth the executive power of the Crown to prevent, repress, or repel aggressive acts of the Confederates in violation of her hospitality, or in the derogation of her sovereignty. Nay, more, the Government of Portugal, finding its own naval force inadequate to prevent the Confederates from abusing the right of asylum in the Western Islands, expressly authorized the American Government to send a naval force there for the purpose of defending the sovereignty and executing the law of Portugal.[6]

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[1] Vattel, *Droit de gens*, éd. Pradier-Fodéré, tome ii, p. 454, note.

[2] Documents annexed to the American Counter Case, p. 958.

[3] *Ubi supra*, p. 1041 *et seq.*

[4] See the circulars issued by the Brazilian Government, in supplementary documents annexed to the American Case, vol. vii, p. 107 *et seq.*

[5] American Case, p. 465.
See documents annexed to the American Counter Case, p. 1013 *et seq.*

(*e*) In Spain, the "Codigo Penal," while repeating the general provision of the French "Code Pénal," adds the following important specific enactment to punish "any person who without legitimate authorization shall levy troops in the kingdom for the service of any foreign power, or shall expedite cruisers, whatever may be the object proposed, or the nation against which it is intended to commit hostilities."[1]

Spain.

But Spain never pretended that she had any right to plead these provisions of her penal code as excuse for omitting to act preventively by executive power to repress misconduct on the part of the Confederates.[2]

(*f*) In regard to the governments of Brazil, Portugal, and Spain, it deserves to be remarked that their respective juridical commentators fully explain the theory of their penal codes as being chiefly valuable to aid in the preservation of the national peace. They rightfully maintain that neither the enlistment of troops in a country for foreign service, nor the equipment of ships of war in their ports for such service, would of themselves, and of necessity, involve any disturbance of the domestic peace. Such acts are not prohibited as being immoral or criminal *per se*, but only if done in derogation of the local sovereignty and in prejudice of the rights of other governments. That is to say, these laws, although not bearing the title of "Neutrality Laws," are quite as clearly neutrality laws in fact as the foreign-enlistment acts of the United States and of Great Britain.[3]

We might extend these remarks to the legislation of all the other maritime states of Europe.

Belgium and Holland.

(*g*) The penal laws of Belgium and the Netherlands, in this respect, are identical with those of France.[4]

(*h*) The provision of the penal code of the Netherlands deserves attention because of the very pertinent remarks respecting it made by the Netherlands minister, Mr. Van Zuylen, in reply to the inquiries of the British *chargé d'affaires*, Mr. Ward.

Mr. Van Zuylen writes as follows:

THE HAGUE, *March* 6, 1867.

Mr. Ward's note of the 16th instant, asking information for his government about the laws, regulations, and other means that the Netherlands may use to prevent violation of neutrality within her borders, has been received.

In reply, the undersigned informs Mr. Ward that there is no code of laws or regulations in the Kingdom of the Netherlands, concerning the rights and duties of neutrals, nor any special laws or ordinances for either party, on this very important matter of external public law. The government may use articles 84 and 85 of the penal code; but no legislative provisions have been adopted to protect the government, and serve against those who attempt a violation of neutrality.

It may be said that no country has codified these regulations and given them the force of law; and though Great Britain and the United States have their foreign-enlistment act, its effect is very limited. The Netherlands government has not yet thought proper to collect the regulations in relation to the rights and duties of neutrality; but has always scrupulously observed the principles of the European law of nations, and has published notices (as Great Britain and France did in 1861) to Netherland subjects not to carry dispatches or articles contraband of war, nor to break an effective blockade, nor to engage in privateering, nor accept letters of marque.

The admission of belligerent ships of war into our ports was regulated in the same manner, and the special instructions sent to our colonial governors, during the civil war in the United States, were communicated to the British legation on the 17th December, 1861.

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[1] Documents, *ut supra*, p. 1051 *et seq.*

[2] *Ubi supra*, p. 1072 *et seq.* See also the letter of the Spanish minister, M. Ribeiro, to Sir A. Paget, Amer. App., vol. iv, p. 158.

[3] See Silva Ferrão, *Theoria do Direito Penal*, vol. iv, pp. 181, 231; and Pacheco, *Codigo Penal Concordado*, tome ii, pp. 91, 96, in Documents, *ubi supra*, pp. 958, 1052.

[4] See *Nederlandsche Wetboeken*, ed. 1865, p. 677, for the law of the Netherlands.

Those notices were more extensive and precise last year. The government undertook to prevent the equipment of war vessels for the belligerents in her ports. A copy of the Official Gazette, March 20, 1866, containing those notices, is hereto annexed.

Articles 84 and 85 of the penal code may be used as coercive measures to prevent violations of neutrality. For example, they might serve to prosecute those attempting to equip or sell vessels of war in our port for the benefit of belligerents. The vessels could then be seized on evidence, and their departure be thus prevented.[1]

Mr. Van Zuylen's language is inaccurate. He obviously intended to express that the Netherlands have no laws known by the *name* of laws of neutrality, or codified as such. He seems not to have thought that mere penal provisions deserved the name, although he refers to penal provisions, which, as he says, are ancillary, in that sense, to the exercise of the executive power of the government, this being the proper, and indeed the only effectual, agency for the protection of its sovereignty against invasive or evasive acts on the part of belligerents.

The efficiency with which executive power is applied to such subjects in the Netherlands is fully manifested by the pertinent circulars of that government.[2]

(*i*) We find similar laws existing in Russia; in Prussia, which had occasion once to apply those laws to the acts of British agents in Prussia; in Denmark, and in Sweden.[3] Russia and Prussia, Denmark and Sweden.

(*j*) The documents, which exhibit the legislation and political action of Denmark in this relation, are particularly interesting, because they so clearly show how the penal or punitive laws were merely and simply supplemental to the preventive action of the Government.

6. On review, therefore, of the legislation and political action of Great Britain, as compared with that of all other Governments, we arrive at the following conclusions: Comparative review.

(*a*) The institutions of Italy, Brazil, Switzerland, France, Spain, Portugal, the Netherlands, and all other Governments of Europe indeed, except Great Britain, expressly assume, as do the institutions of the United States, that volunteer and unauthorized military and naval expeditions, undertaken in a neutral country, are to be restrained, because tending to involve such country in war with the country aggrieved. Infringements of the law are punished mainly for that reason, including the protection of the national sovereignty.

(*b*) Hence, in all those countries, except Great Britain, the *punitive* law is a secondary fact; the primary fact being the preventive action of the Government.

(*c*) The United States perfectly understood this, the true relation of things, and while they indicted persons and arrested ships, they did not, when occasion required action, rely on such merely punitive, or at most auxiliary, means, but called into play the armed forces of land and sea to support the Executive in summary acts of prevention by force for the maintenance not only of the sovereignty but of the neutrality of the Government.

(*d*) Neither Lord Russell, in his correspondence with Mr. Adams, nor the framers of the British Case, appear to have had any clear conception of these higher relations of the subject, although distinctly and explicitly stated in the best works of international law of Great Britain herself.

(*e*) Great Britain alone pretends that punitive law is the measure of neutral duties: all other Governments, including the United States, pre-

[1] Documents annexed to the American Case, vol. iv, p. 155.
[2] Documents annexed to the American Counter Case, Supplement, p. 56.
[3] Ibid., pp. 54, 53, 51, 62.

vent peril to the national peace through means of prerogative force, lodged, by implied or express constitutional law, in the hands of the Executive.

VIII. We are now prepared to judge whether, in the incidents of the present controversy, the conduct of other governments was, as the British government pretends in answer to the reclamations of the United States, the same as that of Great Britain, and whether Great Britain did all which they did in discharge of international obligations toward the United States.

Conclusions.

It is obvious to see that, upon her premises of political action, it was impossible that Great Britain should discharge those duties as they were discharged by other governments.

In point of fact she did not.

(*a*) Other governments not only prevented the armament of cruisers, but also forbade their construction. For example, France, the Netherlands, Denmark.

(*b*) Other governments imposed just limits on asylum, and punished its abuse. For example, Brazil, France, Spain, Portugal.

(*c*) No other government allowed armed cruisers to sail from her ports to prey on the commerce of the United States. She alone furnished the *Alabamas* and the *Floridas*, which, by the capture of our merchantmen, gave to the United States cause of national reclamation.

(*d*) In no other government was the wrong committed of allowing itself, as Lord Russell unequivocally admits, to be subjected to the shame of being the established seat of the military and naval supplies of the Confederates.

IX. Both in the Case and Counter Case of the British government there is elaborate arraignment of the government of the United States, in respect to the manner in which, at various periods of their public history, they have discharged their neutral obligations toward other governments.

The history of the United States as a neutral a part of the British pleadings.

We dispute the right of the British government to discuss any such matter before this Tribunal. Great Britain is here accused, not only of violation of neutrality, but of permitting or suffering the active complicity of her subjects with the rebels of the United States. It is no answer to this charge to say that, at some time past, the American Government was, or may have been, delinquent toward some other government. Such an answer is not compatible with reason or justice, but is contrary to both. Nothing is, or can be, on trial before this tribunal, but the conduct of Great Britain. That, and that alone, is submitted by the treaty of Washington. To summon the United States to enter into discussion of its acts toward other governments, which is in effect now done by the British Government, is to call on the Tribunal to pass judgment on imputed acts of the United States which are wholly outside of the questions to be submitted by the two governments, according to the tenor of the Treaty.

Its relevancy denied.

The British Case and Counter Case, it is true, introduce these matters professedly as bearing on the inquiry of what is due diligence, by examination of what has been the conduct of the United States under circumstances of alleged similarity to those involved in the present controversy. But these matters are not the less discussed by the British Government in the manner and spirit of counter accusation. And, even as to the specific relation in which the subject is professedly introduced by the British Government, it is not the less utterly irrelevant, valueless as argument, and incapable in any respect of instructing the conscience of this Tribunal.

The two governments have submitted the question of the conduct of Great Britain at a precise period of time and in a specific relation, that of the late domestic rebellion in the United States. That is the definite subject to be investigated and judged by the Tribunal, upon the proofs presented by the two governments. As incidental to this particular subject, is the Tribunal to take up and examine twenty other controversies, each wholly independent of that and of one another, and to determine *seriatim* each one of them, in order to know how to determine the particular controversy submitted by the Treaty? That would be preposterous as reason, and impossible to be done, as act.

The counsel of the United States must refuse to consent to have drawn in judgment here the past or present relations of their government to France, Spain, Portugal, Mexico, or even Great Britain herself.

Nevertheless, being thus challenged by the British Government, we presume to say that the history of the foreign relations of the United States, in this respect, if it have any pertinency to the present controversy, has such pertinency to the effect of confirming the theories of public law on which the present reclamations of the United States here stand, as maintained in this Argument.

The Tribunal cannot fail to observe, in the first place, that while Great Britain constantly asserts that her duties of neutrality are defined by an act of Parliament, and that her government has no means or power to maintain neutrality, except by the agencies of an act of Parliament, yet during her entire national life, for a period of nearly eight hundred years, she did not possess any such act of Parliament, and, of course, during all that period she neither could nor did discharge her duties of neutrality towards other governments. It would be an unwelcome task to the counsel of the United States, as they well might, to proceed to imitate the British case, and recount all the occasions, even in more modern times, in which it might be charged that by acts of aggressive intervention, by sea and by land, Great Britain has manifested her slight consideration of the proper rights of the other states of Europe, more especially in the class of maritime questions, and of domestic disturbances existing in other states. Are not the works of jurisprudence of all nations full of inculpations of these acts on the part of Great Britain? Has not every maritime state of Europe, one after the other, been forced in self-defense, in these relations, into war with Great Britain?[1]

And yet it would be much more pertinent to the present issue thus to scrutinize the political conduct of Great Britain with reference to other governments, than it is to scrutinize that of the United States.

Now, then, while, until the year 1819, Great Britain had no municipal law for the preservation of neutrality, and while she steadily disavows the possibility of using any other means, the United States, on the contrary, almost at the very moment of entering into the family of nations, asserted, and have continued to assert, the right and the duty of every government to act as such politically, and by exercise of supreme executive force to watch over, guard, and maintain its neutrality between contending belligerents. While England professes, as her view of public law, that constitutional governments must of necessity allow themselves to drift continually into war by reason of having no other means to keep peace except an act of Parliament, and that confessedly insufficient,—the United States, on the other hand, have as constantly maintained, and do now maintain, that it is the duty of all governments, in-

[1] See Canchy, *ubi supra;* Lucchesi Palli, *Droit Public et Maritime*, p. 55, *et seq.;* Cussy, *Phases, etc.*, préf.

cluding especially constitutional governments, to discharge their neutral duties in obedience to rules of right, independent of and superior to all possible acts of Parliament. In consonance with which doctrine it is that every President of the United States, from President Washington to President Grant, inclusive, has never failed to apply due diligence, voluntarily, *sponte suâ*,—in the vigilant discharge of his own official duty, not in mere complaisance to foreign suggestion,—by himself or by other officers of the Government, to prevent all unlawful enterprises of recruitment or equipment in the United States.

In proof of these assertions, we proceed briefly to touch on such incidents of the past history of the United States as are (however illegitimately) brought into question here by the British Case and Counter Case.

Neutrality toward Great Britain during President Washington's administration.

(*a*) In regard to our first controversy with Great Britain in this respect, in the time of President Washington, we need do nothing more than cite testimony of Englishmen themselves, to the honor and good faith of the American Government.

In the first place, Lord Tenterden, in the documents appended to the British Case, admits the good faith and the efficiency of President Washington.

Secondly, Mr. Canning, certainly one of the greatest ministers of Great Britain, on occasion of opposing the repeal of the British foreign-enlistment act, said:

"If I wished," Mr. Canning said, "for a guide in a system of neutrality, I should take that laid down by America in the days of the presidency of Washington and the secretaryship of Jefferson. In 1793 complaints were made to the American Government that French ships were allowed to fit out and arm in American ports for the purpose of attacking British vessels, in direct opposition to the laws of neutrality. Immediately upon this representation, the American Government held that such a fitting out was contrary to the laws of neutrality; and orders were issued prohibiting the arming of any French vessels in American ports. At New York a French vessel, fitting out, was seized, delivered over to the tribunal, and condemned. Upon that occasion the American Government held that such fitting out of French ships in American ports, for the purpose of cruising against English vessels, was incompatible with the sovereignty of the United States, and tended to interrupt the peace and good understanding which subsisted between that country and Great Britain.[1]

"Here, sir, (he added,) I contend is the principle upon which we ought to act."[2]

Finally, in the midst of the occurrences now in controversy between the two governments, Sir Roundell Palmer spoke as follows in the House of Commons:

"As long ago as 1793, we emphatically insisted that the American Government should not supply France, with whom we were then engaged in hostilities, with vessels of war. We required them to detain those vessels, and Washington did detain them, before any foreign-enlistment act was passed. Washington not only detained the vessels at our instance, but he proposed and carried in Congress the American foreign-enlistment act, as his enemies then said, at our dictation. Precisely the same attacks which are now directed against Her Majesty's Government in this House were then directed against Washington in Congress. There were members of Congress who said that he was truckling to England and allowing the English embassador to dictate to

[1] Appendix to British Case, vol. iii, Supplement, p. 22.

[2] Hansard's Parliamentary Debates, N. S., vol. viii, p. 1019. Canning's Speeches, vol. v, p. 50.

him; they lamented the humiliation of their country and declared that the stars and stripes had been dragged in the dust. But that great man despised the imputation of cowardice; he was strong enough not to fear to be thought afraid, and in spite of clamor—for there will always be violent and excitable men in all popular assemblies,—Washington pursued the course which he knew to be just, and at the same time best calculated for the interest and welfare of his own country. He passed the foreign-enlistment act, and a treaty was subsequently entered into, stipulating, among other things, for the restoration of prizes captured by vessels that were fitted out in American ports."[1]

The counsel of the United States are for themselves content with their own convictions on this point, but they conceive that the testimony of Mr. Canning, Sir Roundell Palmer, and Lord Tenterden may fitly serve to satisfy this high Tribunal.

(*b*). The British Case impliedly blames the United States on account of the expedition of Miranda. Expedition of Miranda.

Francisco Miranda, born in the Spanish-American province of Venezuela, had served in the army of France under commission of the National Convention, but was suspended from command, and banished for misconduct at the battle of Nerwinde.[2] He became besotted with the idea of being the predestined regenerator of his native country, without other capacity or resources than his own extravagant self-conceit. He by some means made himself acceptable to Mr. Pitt, who encouraged him in the idea of getting up an expedition for the invasion of Venezuela.[3]

Political considerations standing in the way of his doing this in England, he went to the United States, thinking to find there a convenient point of departure. But President Adams steadily repelled his advances, and rendered abortive all his attempts to get up the proposed expedition.[4] Some years afterward, still favored by Great Britain,[5] he again appeared in the United States with the same purposes.

He had much of the plausibility, and all the impudence, of that class of cosmopolitan exiles and adventurers. By the exhibition of deceptive letters written by himself to President Jefferson and Secretary Madison—letters, on their face, of mere courtesy—he contrived to impose on credulous persons and obtain aid in New York; for in this case, as in all like cases, fraud and falsehood lie at the bottom of such unlawful enterprises.

Thus he was enabled to organize an expedition and get to sea without knowledge of the Government.[6]

On the way to Caracas he stopped at the English islands of Barbadoes and Trinidad, where he was treated with the utmost consideration by the British officers, civil and military, and where he received from Admiral Cochran, in command of the British West Indies, a written contract of alliance and copartnership under date of June 9, 1806, by the tenor of which Great Britain adopted the expedition of Miranda, and furnished it with additional supplies and vessels.[7]

The expedition landed at Vela de Coro, but failed of success by reason of the deplorable incapacity of Miranda; and he, dishonored by the manifest proofs of the falsehood by which he had imposed upon the

[1] Hansard's Debates, vol. clxxiii, p. 955.
[2] See History of Don Francisco de Miranda's attempt to effect a revolution in South America.
[3] See Antepara's Documents, Historical and Explanatory, p. 13.
[4] The Works of John Adams, by Charles Francis Adams, vol. i, pages 523, 531; vol. viii, pages 569, 581, 600; vol. x, p. 134.
[5] Dodsley Annual Register for 1807.
[6] History of Miranda's Expedition, as above, *passim*.
[7] See this extraordinary contract in Antepara's Documents, Historical and Explanatory, &c., p. 213.

adventurers, British and American, enlisted in the expedition, disappeared from public sight. We find him living some time afterward; but we do not find that he ever did any actual service to the patriots of Spanish America.

Some of these adventurers, on their return to the United States, were indicted; but the jury failed to convict, partly in consequence of ingenious sophistries of their counsel, and partly, we think, by reason of the notorious participation of the British naval authorities in the West Indies.[1]

We submit that there is nothing in the adventures of this Miranda which reflects discredit on the United States or favors the argument of the British Government.

Whatever responsibility, if any, devolved on the United States in the premises, was long ago amicably settled between them and Spain.

Revolt of Spanish American colonies.

(c) Next the British Case calls attention to the general conduct of the United States in reference to the long-continued hostilities between Spain and her revolted Colonies in America.

We confess that we are surprised that Great Britain especially should, in this relation, question the acts of the United States.

The American Government did not hasten at the earliest moment of revolutionary political movement in those Colonies, and before the occurrence of any significant military event whatever, to accord the status of belligerents to the rebels of Spain, as Great Britain did to those of the United States. We waited, as discretion and justice required we should do, until the civil war in Spanish America forced itself upon our attention by incidents in our own ports arising out of captures on the sea, as to which action became requisite on the part either of the Executive or of the courts of the United States.

When that civil war had raged for years, without Spain having succeeded in reducing her rebel subjects to submission, we still abstained from all political action in the premises to the prejudice of Spain, until we had sent informal commissioners to Spanish America to inquire and make report concerning the condition of things there. Even then, before proceeding to definite political action, we deliberated still, and, not without concurrence of opinion at least of Great Britain in this respect, at length we concluded that the revolted Colonies had reached such a condition of sure actual independence as to be fully entitled to be recognized as independent States.

During all this long period, the United States steadily labored to prevent the equipment of vessels in their ports to the prejudice of Spain. The successive Presidents of the United States were positive in instruction to all subordinate officers, and vigilant in observation, to enforce the execution of the laws of neutrality, international as well as municipal. Prosecutions were instituted in the courts; vessels unlawfully captured were restored, by judicial or administrative order; and the principals of neutrality were proclaimed and maintained in every act, whether of the courts or of the Executive.

As to the courts of the United States, we have a right to say that their decisions, during that period, on this class of questions, are now received as authoritative expositions of public law not less in Great Britain, and in other parts of Europe, than in the United States.

As to the deportment of the Executive in the course of these occurrences, we confidently appeal to the mass of official acts and correspondence contained in the documents annexed to the American Counter Case, to prove that the American Government not only did everthing which

[1] See Trial of Smith and Ogden, *passim*.

law required, but did everything which was humanly possible, by preventive vigilance, as well as by punitive prosecution, to discharge the neutral obligations of the United States.

Did the American Government, at any time, or on any occasion, either willfully or with culpable negligence, fail to discharge those obligations? We deny it; although, in the midst of almost continual warfare, both in Europe and America, it is possible that violations of law may have occurred, in spite of all preventive efforts of that Government.

What then? If we did injury to Spain we repaired that injury. The treaty of amity, settlement, and limits between the United States and Spain, of February 22, 1819, disposed of all this subject by mutual concessions, renunciations, or indemnifications, in the following article, namely:

ARTICLE IX. The two high contracting parties, animated with the most earnest desire of conciliation, and with the object of putting an end to all the differences which have existed between them and of confirming the good understanding which they wish to be forever maintained between them, reciprocally renounce all claims for damages or injuries which they themselves, as well as their respective citizens and subjects, may have suffered until the time of signing this treaty.

The renunciation of the United States will extend to all the injuries mentioned in the convention of the 11th of August, 1802.

2. To all claims on account of prizes made by French privateers, and condemned by French consuls, within the territory and jurisdiction of Spain.

3. To all claims of indemnities on account of the suspension of the right of deposit at New Orleans, in 1802.

4. To all claims of citizens of the United States upon the government of Spain, arising from the unlawful seizures at sea, and in the ports and territories of Spain or the Spanish colonies.

5. To all claims of citizens of the United States upon the Spanish Government, statements of which, soliciting the interposition of the Government of the United States, have been presented to the Department of State, or to the minister of the United States in Spain, since the date of the convention of 1802, and until the signature of this treaty.

The renunciation of His Catholic Majesty extends—

1. To all the injuries mentioned in the convention of the 11th of August, 1802.

2. To the sums which His Catholic Majesty advanced for the return of Captain Pike from the Provincias Internas.

3. To all injuries caused by the expedition of Miranda, that was fitted out and equipped at New York

4. To all claims of Spanish subjects upon the Government of the United States arising from unlawful seizures at sea, or within the ports and territorial jurisdiction of the United States.

5. Finally, to all the claims of subjects of His Catholic Majesty upon the Government of the United States, in which the interposition of His Catholic Majesty's Government has been solicited before the date of this treaty, and since the date of the convention of 1802, or which may have been made to the department of foreign affairs of his Majesty, or to his minister in the United States.[1]

This high Tribunal perceives that, in view of this treaty, it is vain for the British Case to attempt to revive controversy on the subject. Both Spain and the United States had mutual causes of reclamation, which both governments frankly settled and terminated by amicable convention, to their mutual satisfaction, and on conditions which cannot be questioned by any other government.

One thing more in this relation. We respectfully request the Tribunal to observe that neither Spain nor the United States supposed that damages or injuries done by one government to another were mere indirect damages or injuries, and so not comprehended in the terms of a treaty, expressly professing to dispose of "all claims," "all questions," and "all differences."

[1] The United States Statutes at Large, vol. viii, p. 258.

Spain and the United States by this treaty "reciprocally renounced all claims for damages or injuries which *they themselves, as well as their respective citizens and subjects*, may have suffered." They rightly supposed that a blow struck by one government at another is a direct wrong, sounding in direct damages, and calling for direct compensation, quite as much at least as a blow struck by one government at individual subjects of another government.

War between Portugal and the Banda Oriental.

(*d*) The British Case also calls in question the conduct of the United States in reference to the war between Portugal and the Banda Oriental. This matter is thoroughly and exhaustively discussed in the correspondence appended to the American Case. It also receives satisfactory exposition in the Case itself.

We, therefore, content ourselves here with reference to the voluminous documents annexed to the American Counter Case, which manifest the unceasing efforts of the American Government to prevent its citizens from taking part in that war, or doing any acts prejudicial to the Portuguese Government.

Walker's expedition.

(*e*) The British Case makes reference to the acts of William Walker, and other adventurers of that sort, who, at a certain period, embarked in expeditions of adventure to Central America.

The United States, in extenuation of the fact that some expeditions of this class escaped the vigilance of the American Government, do not plead either the extent of the coasts of the United States, and consequent difficulty of surveillance, nor the disturbed state of the countries which were the objects of such expeditions, as we might do, but we pass over all that class of considerations to say that the American Government, in these occurrences, exerted all its power, legal and political, to prevent, repress, and punish everything contrary to its duties of neutrality or its rights as a sovereign.

The successive Presidents of the United States acted efficiently in the premises by proclamations to all citizens generally, and by instructions and orders to officers, civil and military; and the Attorney-General of the United States directed the prosecution and secured the conviction of leading offenders; and the naval officers of the United States even proceeded to break up such enterprises by military interposition either on the high seas, or in the ports of Central America, in action not unlike that of the British Government in the affair of Terceira.

We entreat the members of the Tribunal to peruse the documents, in this relation, contained in the appendix to the American Counter Case, to which we confidently point as furnishing complete vindication of the United States in the premises.

Cuba.

(*f*) We make the same observation as to the alleged absence of due comportment on the part of the United States, either at the present time or heretofore, in reference to the Spanish possessions in Cuba. The documents annexed to the Counter Case, we confidently believe, will satisfy this Tribunal of the rightfulness of the conduct of the United States in this behalf.

Here, also, we call attention to signal proofs of the upright spirit and just action of the United States with reference to the rebels of Spain, in contrast with the temper and action of Great Britain with reference to the rebels of the United States.

In the first place, the President of the United States did not jump to make recognition of the belligerence of the Cubans, upon the first rumor of a gun having been fired by or against them; and to this day he

has resisted temptation and pursuasion to take that step, moved to abstinence by his own conviction of public duty and right.

Secondly, in case after case, Cubans seeking to fit out vessels in the ports of the United States have been arrested, and their attempts broken up by the executive interposition of the President.

Thirdly, Spain, as the treaty friend of the United States, has not been subjected to the wrong of seeing her rebels raised in the ports of the United States to the level of herself their sovereign; but, on the contrary, has been allowed, as she had a right to do, openly to build or purchase men-of-war in the United States.

Finally, no cruisers have sailed from the ports of the United States to prey on the commerce of Spain. Therefore, if, which we deny, Spain suffered any damages in the premises at the hands of the American Government, those damages must be of the nature which Great Britain regards as indirect damages, and therefore never in any circumstances due from one to another gonernment.

(*g*) Allusion also occurs, in the British Case or Counter Case, to some occasions in which persons in the United States have invaded, or attempted to invade, the Canadian Dominion. Fenians.

Such occurrences have existed, as they do in all frontier countries. As to the first of them, it deserves to be stated that special provisions of law were enacted to enable the President of the United States more effectually to discharge the duties of the Government toward Great Britain.

In reference to that, and some other occurrences of the same nature, it is well to note the testimony borne by Sir Roundell Palmer in a speech made by him in the House of Commons, already quoted on a particular point, and in which he further says:

I wish to impress upon the House that, as far as the enforcement of their foreign-enlistment act is concerned, we have absolutely no grievance against them, (the United States.) They have again and again restored prizes captured in violation of that act. As recently as the Russian war, in a case where we complained that a vessel called the Maury was fitted out in violation of the foreign-enlistment act, they immediately detained that vessel, her clearance was stopped, and an inquiry was subsequently directed, and that inquiry, conducted entirely to our satisfaction, ended in our expressing a belief that there were no real grounds for the suspicion entertained. In the interest of peace and amity between the two countries, therefore, I wish the House to understand that we have no grievance against them with regard to the foreign-enlistment act, and that it deeply concerns our honor to enforce the foreign-enlistment act.[1]

In reference to later incidents of the same class, in which Irishmen in the United States have attempted to invade Canada, we present the testimony of the British minister in the United States, whose dispatch testifies in terms which may fitly close this part of the present Argument, as follows:

WASHINGTON, *July* 13, 1866.

SIR: I have duly reported to Her Majesty's Government the disturbances that lately took place on the frontiers of New Brunswick and Canada, and the measures taken by the Government of the United States to prevent those expeditions of armed men, in breach of the neutrality laws, from being carried into effect.

I am directed by Her Majesty's government, in reply, to state that for some months past they have observed with regret, though without alarm, the organization of the Fenians in the United States; but they have invariably abstained from making any official representation to the cabinet at Washington, because they felt they had no right, as indeed they had no desire, to interfere with the administration of the law in the United States. They had, moreover, a perfect conviction that if ever the time came for the fulfillment by the United States of the obligations which international law imposes upon friendly and allied governments, that Government would take all the measures which those obligations and regard for its own honor might call upon it to perform.

[1] Hansard's Debates, vol. clxxiii, p. 955.

Her Majesty's Government rejoice to find that this confidence has been fully justified by the result, and that the Government of the United States acted, when the moment for acting came, with a vigor, a promptness, and a sincerity which call forth the warmest acknowledgments.

I am, in consequence, instructed to express to the Government of the United States the thanks of Her Majesty and Her Majesty's Government for the friendly and energetic assistance which they have afforded in defeating the attempts to disturb the peace of Her Majesty's possessions in North America.

I have the honor to be, with the highest consideration, sir, your most obedient, humble servant,

FREDERICK W. B. BRUCE.

Hon. WILLIAM H. SEWARD, *&c.*, *&c.*[1]

We remark, in passing, that in all the cases referred to by Sir Frederick Bruce and Sir Roundell Palmer, of the conduct of the United States in relation to Great Britain, this conduct has been the same at all times in relation to other governments. As we are entitled to the ascription of "a vigor, a promptness, and a sincerity which call forth the warmest acknowledgments," in the former class of occurrences, so we are in the latter, the British Case and Counter Case to the contrary notwithstanding. In every instance of attempt to violate our neutrality, on the part whether of governments or of private persons, we have set in action all the juridical machinery of the municipal law; we have pushed into vigilance our custom-house officers, which England has, and our district-attorneys and marshals, which England has not; but in addition to and beyond all that, the President of the United States acted in advance to enforce, not diligence only, but active vigilance, on all subordinate officers of the Government; and when wrong-doers manifested obstinate persistence of wrong, the military and naval officers, of character and discretion, like General Scott, Admiral Paulding, and General Meade were employed to apply to such persons the only method of prevention applicable to the case, namely, force, to maintain the domestic order and foreign peace of the Government.

We regret, and have sufficient cause to regret, as the present controversy shows, that Great Britain, who cannot blind herself to the vigor, promptness, and sincerity manifested by the American Government in repressing such acts in America, has not manifested equal vigor, promptness, and sincerity herself in repressing similar acts in Great Britain.

British enlistments during the Crimean war.

(*h*) The counsel of the United States would gladly abstain from reference to another occurrence in this class of incidents, because, unlike what has gone before, it is not of a defensive, but of an accusatory character.

It singularly happens, while Great Britain, in her Case and Counter Case, is so careful to recount what she assumes to be the imperfections of the United States, in the execution of our foreign-enlistment act, heaping up a long train of accusations against us, she forgets that the most serious of all the occasions, in which the United States have been called on to act, was the attempt of Great Britain, to the prejudice of Russia, to violate, on a large scale, the neutrality of the United States. And the occasion is the more remarkable, seeing that the British ministers themselves, with characteristic misconception of the whole subject of neutral rights and duties, procured a special act of Parliament to be passed for the single and precise object of enabling them to invade the sovereignty, and to violate the local laws, of every country in Europe and America.

We allude to the act of Parliament, passed at an early day during the war between Great Britain and Russia, professedly and avowedly to enlist soldiers abroad of its own authority for service against Russia.

[1] Documents annexed to the American Case, vol. ii., p. 130.

We understand how the British ministers fell into the error of thus exposing to the gaze of the world, on this occasion, the difficulty of obtaining troops at home. In former wars, as we in the United States had sad experience, it had been the custom of Great Britain thus to act, at a period of time when the enlistment of foreign troops was a practice all but universal in Europe.

But what we should not understand, but for the false theory which pervades the Case and Counter Case of Great Britain here, is, that the British ministers should have imagined that the *rights* of Great Britain, as respects all foreign governments, are determinable by an act of Parliament.

On both points British ministers appear to entertain consistent theory. The neutral obligations of Great Britain, as respects any foreign government, are but such as are set forth in an act of Parliament; and Parliament is to determine her *rights* as respects foreign governments. On both related points they act and think as if no law of nations existed, or, at least, as if an act of Parliament could dictate the law of nations for all other governments.

That enlistment of troops in any country, for foreign service, can only be made lawfully with the consent of the local government, is elementary doctrine of public law.[1]

It is equally well established at the present time that, if such enlistment be allowed by a neutral to one belligerent, it must be allowed to the adverse belligerent; and, since the publication of Sir Robert Phillimore's great work on international law, probably no person, even in Great Britain, would dispute the proposition.

It took time, however, for *British* jurists to open their eyes to this self-evident doctrine of neutrality. Wildman seems to have little or no conception of that point,[2] and it needed that Manning should enter into elaborate argumentation on the subject, as if it were a wholly new question, in order to introduce the rightful opinion into Great Britain.[3]

And yet Great Britain herself had manifested, by several acts of Parliament, that she saw clearly the inconvenience and the wrongfulness of foreign governments, or private persons, enlisting troops within the jurisdiction of Great Britain, without the authorization of the government.[4]

There never was any doubt or hesitation upon this subject in the United States. Our statesmen, beginning with Mr. Jefferson, at all times have unequivocally and positively maintained it; and our jurists, such as Wheaton, Lawrence, Kent, and Halleck, are careful to state the doctrine with explicitness. At the present day, in presence of the extensive erudition and systematic completeness with which Sir Robert Phillimore has expounded the principles of international law, including this point in all its relations,[5] it might seem that the truth would be accepted in Great Britain.

Nevertheless the same old error still lingers there, if we may judge from the tenor of the British Case and Counter Case; that "insularity" of legal perception, of which eminent English jurists speak, still ope-

[1] Wolff, *Jus gentium*, s. 747. Vattel, *Droit des gens*, éd. Pradier-Fodéré, liv. iii, chap. 7, s. 449. Klüber, *Droit des gens modernes de l'Europe*, s. 285. Martens, *Précis du droit des gens*, s. 30. Galiani, *Dei doveri de principi neutrali*, p. 325. Hautefeuille, *Droits et devoirs des nations neutres*, tome i, 312, 313. Riquelme, *Derecho publico internacional*, tom. i, p. 144.

[2] *International Law*, vol. i, p. 64.

[3] Law of Nations, book iii, chap. 1.

[4] See numerous acts of Parliament on this subject, collected in Phillimore's International Law, vol. 1, p. 212.

[5] Vol. iii, p. 209 *et seq.*

rates;[1] and, while the British Government acted in the matter of enlistments as if the act passed during the war with Russia was supreme over all the *sovereign* rights of other governments, so it now assumes that an act of Parliament is supreme over all the *neutral* rights of other governments.

On the former occasion Great Britain came in conflict with the neutrality laws of the United States and Prussia. In each of these countries, she assumed to carry into effect a domestic act of Parliament of her own, without asking the consent of the local government. In each of them, her agents were indicted and convicted of violation of the municipal law of the land. And in the United States, where the British minister was personally compromised in these unlawful acts with various British consuls, in disregard of their diplomatic or semi-diplomatic quality, it became painfully necessary for the American Government to withdraw the exequaturs of the consuls, and to deliver his passport to Mr. Crampton.[2]

We trust the Tribunal, on the perusal of those documents, will be satisfied of the sincerity and good faith with which the American Government executed its municipal laws, and discharged its neutral duties, on this, the only occasion, since the revolutionary action of France, in which any foreign government has undertaken to perpetrate such acts in the United States.

Qualis ab incepto talis ad finem. With consistency unwavering, and at whatever hazard of domestic or foreign inconvenience, even if it were friendly powers like France and Great Britain with which we were thus brought into contention, the United States have steadily adhered to the principles of international neutrality; and we may well, therefore, demand the observance of those principles, or reparation for their non-observance, on the part of Great Britain.

The course of Great Britain as a belligerent towards neutrals.

X. We repeat a previous remark, that we are not disposed to follow the example set us in the British Case and Counter Case, as we might well do, by entering into examination and arraignment of the course pursued by Great Britain at various times on the subject of neutrality in her controversies with other governments. It is not agreeable to a *friend* to be compelled to say,

> "All his faults observed,
> Set in a note-book, learned and conned by note,
> To cast into my teeth."

This the British Case does, wantonly, offensively. If the United States were to scan with like evil eye every occasion in which Great Britain might seem to have neglected her duty as a neutral, or to have violated the rights of neutrals, we might produce a fearful list of charges; and such examination would be more pertinent to the present issue, and bring into view matters more pregnant of instruction, than those as to which the conduct of the United States is called in question here by the British Government.

We content ourselves, in this relation, with a brief reference to two or three great controversies of special interest to the American Government, where the British Government has manifested its views of the duties of neutrality, and of the manner of dealing with alleged breaches thereof by the neutral.

Orders in council.

1. The celebrated orders in council, issued by the British government in retaliation of the Berlin and Milan decrees of the first Napoleon, involved intense assertion of neutral obliga-

[1] Phillimore, 1st ed., pref., p. 11; Chitty's Practice, pref., p. 5, note.

[2] See the documents on this subject in the Appendix to the American Counter Case.

tion; and that in the form of acts of force as against the United States, which responded to these wrongful measures by an act of Congress forbidding all commercial intercourse between our citizens and either of the belligerents.[1] This act, says Phillimore, "ranks high in the history of nations. It conveyed a just and dignified rebuke both to France and England, and it was worthy of the country which has contributed such valuable materials to the edifice of international law."[2]

Course toward France during the American Revolution.

2. The discussion between Great Britain on the one hand, and France on the other, in the first year of the American Revolution, produced three papers on the subject of neutral obligation, of the greatest importance in the diplomatic history of modern times, and which contain many observations pertinent to the present controversy, namely, the "*Exposé des motifs de la conduite du Roi de France relativement à l'Angleterre*, 1779;" the responsive "*Mémoire justificatif*," published by the court of London, the authorship of which is attributed to the historian Gibbon; and the "*Observations de la Cour de Versailles sur le Mémoire justificatif de la Cour de Londres.*"[3]

Course toward the Netherlands.

3. Meanwhile, controversy was pending between Great Britain and the Netherlands similar to that with France. The British Government complained that the Government of the United Provinces had not exercised due diligence to prevent their subjects from furnishing arms and other supplies to the Americans; and that abuse of the right of asylum in the ports of the Netherlands had been suffered the advantage of the Americans and the prejudice of Great Britain.

Especially is it interesting to see, in this controversy with the Netherlands, that Great Britain complained incessantly of occurrences in the Dutch colonies of Saint Eustatius, Saint Christopher, Curaçao, and Surinam, charged as breaches of neutrality, although acts by no means so serious as those, of a similar nature, which the United States here charge against Great Britain, in regard to the Bahamas, Bermuda, and other British possessions in the West Indies.

The Government of the United Provinces, unlike France, had no thought or purpose of departing from neutrality. It defended the acts, inculpated as breaches of neutrality, by the same arguments, in reference to commerce, and to the right of asylum, as Lord Russell employed in discussion with Mr. Adams. But the British Government regarded all those acts as acts of neutral negligence or of belligerent complicity on the part of the United Provinces, and as a sufficient cause of war, and thus forced the Netherlands into an armed alliance with the United States.[4]

But the prudent and sagacious statesmen, who have administered the foreign affairs of the United States in the present controversy, have preferred a patient perseverance of insistance in the right direction, so as to cause arbitration to be substituted for the more dread issue, to which, in like circumstances, men of less wisdom conducted Great Britain.

General obligations of neutrals.

X. The Counsel of the United States desire to say in conclusion of this part of the Argument, that we have, by the imperative exigencies of the present controversy, been compelled to compare and contrast the manner in which the duties of neutrality have been performed at different epochs by the United States and by Great Britain, and especially to insist on the delinquency of the British Gov-

[1] Manning, Law of Nations, vol. iii, ch. 10; Phillimore, vol. iii, p. 412.
[2] Vol. iii, p. 250.
[3] See these documents at large in Martens, *Causes célèbres*, tome iii, cause 2de.
[4] See the history of this controversy in Martens, *Causes célèbres*, tome ii, cause 10me.

ernment, in this respect, relatively to the American Government. We could not otherwise discharge the special duty devolved upon us in behalf of the United States.

We concede the embarrassments which a state of war throws upon neutral nations, by reason of the conflict which it involves between the interests of the latter and those of the belligerent state or states.[1]

The right of neutrality, we concede and admit, is co-extensive with the right to declare war and to make peace. All these rights are included in the simple right of national independence and sovereignty.[2]

Recognizing, then, the right of neutrality as equally sacred with the right to make war, we insist that the duty of neutrality corresponds to the right, although to the prejudice of one or the other belligerent; and in so far as the right of neutrality obstructs belligerent operations, the neutral State may nevertheless stand on its neutrality, even combatively. But such neutral must stand there in an attitude of absolute impartiality: that is of course.[3]

And such impartiality implies as well impartiality of inaction as impartiality of action.[4]

Neutrality, as defined by Klüber, is the condition of a neutral people, who, in the case of war, render succor to neither of the belligerent parties.[5]

As defined by Hübner, neutrality consists in complete inaction relatively to the war, and in exact and perfect impartiality, manifested by means of acts with regard to the belligerents, in everything which has relation to the war, and to the means, direct and indirect, of carrying it on.[6]

Azuni defines neutrality to be the continuation of the state of peace on the part of a power, which, on war arising between two or more nations, abstains absolutely from taking any part therein;[7] and this last definition has the approval of one of the most conspicuous of the modern jurists of Italy.

But in whatever sense neutrality is to be defined, and howsoever it originates, certain it is, that such neutrality must be one of absolute good faith: it must not degenerate into war in disguise.[8]

Accepting, as we do, the comprehensive definition of neutrality given by Fioré, we need not scruple to cite the appreciation, which that intelligent author expresses, of the historical attitude of the United States in the relation.

"In spite," says Fioré, "of the efforts of Holland and Scandinavia, the cause of neutrals found no real support until there arose a powerful State to maintain their common rights. It was not, in truth, before the constitution of the potent neutral State of the United States of America, which was followed by the league of the armed neutrality in the seas of Europe, that the right of neutrals, having solid support to stand on, began to develop itself progressively, until that right reached its assured

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[1] See Casanova, *Del Diritto Internazionale*, vol. ii, lez. 21.

[2] Klüber. *Droit des Gens*, § 279; Galiani, *Dei Doveri dei Principi*, pt. i, c. 3; Hautefeuille, *Droits et Devoirs des Nations neutres*, tom. i, p. 376.

[3] Martens, *Droit des Gens*, éd. Vergé, tome ii, p. 292 *et seq.*; Heffter, *Droit international*, p. 276 *et seq.*; Cauchy, *Droit maritime*, passim.

[4] Massé, *Le Droit commercial dans ses Rapports avec le Droit des Gens*, tomo i, p. 165.

[5] *Droit des Gens*, chap. ii, § 279.

[6] *De la Saisie des Bâtiments neutres*, tome i, part 1, chap. ii.

[7] *Diritto Marittimo dell' Europa*, cap. i, art. 3.

[8] See the complete and exhaustive discussion of this question in Calvo, *Derecho internacional, Téorico y Practico, de Europa y America*, tome ii, pp. 150, 403. See, also, Gessner, *Droit des Neutres sur Mer*, passim.

triumph, in resolving, by principles of justice, the multifarious questions which had agitated past ages."[1]

We need not stop to inquire against what power it was that these efforts for the development and establishment of neutral rights were directed by the neutral powers which acted in concert to that great end.[2]

The Counsel of the United States may be permitted, in view of the express or implied charges of the British Case and Counter Case, to regard with satisfaction, if not with pride, the part thus accorded to their country, in the maintenance of neutral rights, and the discharge of neutral duties alike, by the impartial voice of Europe.[3]

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[1] Fiore, *Nouveau Droit international public suivant les besoins de la civilisation moderne*, tome ii, p. 388.

[2] See Cauchy, *Droit Maritime*, tome i, préf.; Cussy, *Phases*, &c., préf.

[3] Among the matters which the British Case or Counter Case introduces to attention are several which are too insignificant for notice in the text, but which may need a word of commentary.

John Laird as a witness.

John Laird, ex-partner and father of "John Laird, Sons & Co.," appears making statements against the United States.

The Lairds, it should seem, would better hide their heads. And it would seem that Great Britain, who, largely by their means, has been involved in acts which profoundly, and perhaps permanently, disturb her relations with the United States, had had quite enough of such persons.

As *witnesses*, they are worthless. Laird, senior, dishonored himself by deceptive statements in the House of Commons with respect to the operations of Laird, Sons & Co. The time when he could win applause there by boastful hostility to the United States has passed. Neither Lord Palmerston, if living, nor Lord Russell, if in the House of Commons, nor Mr. Gladstone himself, could look with complacency to-day on the ship-building firm which so zealously served the confederates, to the injury alike of Great Britain and of the United States.

1. John Laird says that a man-of-war was built in the United States for Russia, and delivered to her during her late war with Great Britain. Proof, a newspaper statement in the Times. Laird and the Times are both mistaken. The case of the Maury, mentioned by Sir Roundell Palmer, shows that at this period British officers in America, while engaged in violating the American foreign enlistment act themselves, were watchful to prevent its violation by Russia.

Laird communicated to Lord Tenterden, December 12, 1871, copies of letters between Laird, Sons & Co. and Mr. H., an American, who corresponded with the former on the subject of building a ship or ships for the United States. The correspondence shows that Mr. H. was a mere speculator on his own account, wholly without any authority from the Secretary of the Navy of the United States. "*Our* Department of *Naval Affairs*," as he ignorantly calls it, and our "Minister of the Navy," which expressions alone ought to have satisfied the Lairds that they were being *victimized* by some ingenious New Yorker. Mr. H. abusively referred to the Secretary of the Navy to promote his own private interests or those of the Lairds.

John Laird, in the zeal of his sympathy with the rebellion, made the same statement in the House of Commons long ago, and was flatly contradicted by Mr. Welles, the American Secretary of the Navy.

The superserviceable Mr. H. had no commission from the American Government. He began to treat orally with the Lairds, early in 1861, before the arrival of Mr. Adams in England. No officer of the United States appears to have countenanced Mr. H., but the Navy Department, according to Mr. Welles, was importuned by more than one person in behalf of Mr. Laird. If Mr. H. was the agent of anybody, it was of the Lairds.

The British Government must be in desperate straits for defense, when it condescends to resuscitate the stale calumnies of "*un homme taré*," like John Laird, and to put them into its Case.

2. In this connection we dispose of another of the smaller items of accusation of the United States.

Purchase of arms.

It is charged in the British Case that we purchased arms in England. What then? Was it not lawful to do so, according to the accepted law of nations?

This charge is another illustration of the injustice of that act of the British Government which assumed to put the United States and their rebels on a footing of international equality in the markets of Great Britain.

Not thus have the United States deported themselves toward Spain in the matter of Cuba.

V.—STATEMENT OF SOME GENERAL FACTS PERTINENT TO THE INQUIRY, AND APPLICABLE TO EACH CRUISER.

Resume of facts stated in the American Case to establish unfriendly animus of British government and people.

The United States in their Case, which was delivered to the Tribunal of Arbitration on the 15th day of December last, presented evidence to establish the following facts:

1. That before the outbreak of the insurrection in the United States, Her Majesty's Government invited the Government of the French Emperor to act jointly with the British Government in the anticipated rising of the insurgents.

2. That before an armed collision had taken place, Her Majesty's Government determined to recognize the insurgents as belligerents, whenever the insurrection should break out.

3. That, in accordance with the previous invitation to the French Government, Her Majesty's Government announced its decision so to recognize the insurgents, and invited France to do the same, as soon as it heard of the outbreak of the insurrection, and before it had official information of the steps which the Government of the United States proposed to take for the suppression of the same.

4. That after the announcement of this decision was made, and before the Queen's Proclamation was issued in accordance therewith, the attention of Her Majesty's Government was called in both houses of Parliament to results which it was supposed would follow the recognition of the insurgents as belligerents, viz, that they would be entitled to carry on war on the ocean, and to issue letters-of-marque.

5. That, simultaneously with the invitation to the French Government to join in the recognition of the insurgents as belligerents, that Government was invited to join Her Majesty's Government in an effort to obtain from the insurgents certain advantages to British and French commerce, on the condition, held out in advance, that the right of the insurgents to issue letters-of-marque should not be questioned.

6. That these steps were taken clandestinely, without the knowledge of the United States; and that the desired advantages were obtained, and the right of the insurgents to issue letters-of-marque was recognized.

7. That these unfriendly acts, committed before or soon after the outbreak of the insurrection, were supplemented by other unfriendly acts injurious to the United States and partial toward the insurgents.

8. That they were also supplemented by public speeches made by various members of Her Majesty's Government, at various times, throughout the war, showing that the speakers had personal sympathies with the insurgents, and had active desires that they should succeed in their attempts to defeat the forces of the United States.

The United States further insisted in their Case that the facts which they had so established showed an unfriendly feeling toward them, which might naturally lead to, and would account for, a want of diligence bordering upon willful negligence.

The British response no denial.

Her Majesty's Government has met this part of the Case of the United States by the following averments:

To the second chapter of the American Case, which imputes to the British govern-

ment hostile motives and even insincere neutrality, no reply whatever will be offered in this Counter Case. The British Government distinctly refuses to enter upon the discussion on these charges. First, because it would be inconsistent with the self-respect which every government is bound to feel; secondly, because the matter in dispute is action, and not motive, and therefore the discussion is irrelevant; thirdly, because to reply and to enter upon a retaliatory exposition, must tend to inflame the controversy, which in the whole tone and tenor of its Case the British Government has shown its desire to appease; and lastly, with respect to the charges themselves, if they were of any weight or value, the British Government would still contend that the proper reply to them was to be found in the proof which it has supplied that its proceedings have throughout, in all points, been governed by a desire, not only to fulfill all clear international duties toward the Government of the United States, but likewise, when an opportunity was offered, even to go beyond what could have been demanded of it as of right, in order to obviate all possibility of cavil against its conduct.

Her Majesty's Government states, in substance, that for three given reasons no answer will be made to the charges made by the United States; and this statement is followed by an averment that "the proof which Her Majesty's Government has supplied" "rebuts the charges which the United States contend to have established." We have but few remarks to make in respect to these conflicting averments.

Rejoinder to the British response.

To the statement that to reply to the charges would be inconsistent with the self-respect of Her Majesty's Government, we cannot presume to interpose an answer. We recognize that each independent Government must be the guardian of its own self-respect, and must decide for itself whether the attempt to answer or to explain such facts as were contained in the Case of the United States is inconsistent with that self-respect.

To the averment that such a reply would tend to inflame the controversy, we venture to submit to the arbitrators that it is not easy to see how a friendly explanation of acts which, when committed, naturally tended to excite the present controversy, will assist in continuing or increasing the feeling which those acts caused.

To the assertion that a retaliatory exposition would tend to inflame the controversy, we reply, denying that any retaliatory exposition can be made by Her Majesty's Government. The tribunal will observe what the "exposition" of the United States has been. It has been charged and proved that Her Majesty's Government collectively committed acts, and that the members of that Government individually made speeches, that revealed an active feeling of unfriendliness to the United States, which would lead to and account for the acts of which complaint is made before this Tribunal. How is it possible to make "a retaliatory exposition of" such charges? Great Britain is not here complaining of any act of the United States. What the Government of the United States may have done, or what the individual members of that Government may have said, in respect to the Government of Great Britain, or in respect to the members thereof, touching any of the occurrences of the war which may be brought to the notice of the tribunal, cannot become material or relevant here.

If Her Majesty's Government conceives that it is in its power to present here proof of acts or of sayings on the part of the Government of the United States, or of the members thereof, which ought properly to be taken into consideration by the Tribunal, the charges should be openly made, rather than insinuated. We feel confident that no such proof can be found.

Relevancy of the facts to the issue.

The averment that the discussion is irrelevant has been received with surprise. We had supposed it to be a fundamental principle of law, in the jurisprudence of all civilized nations, that the motives which prompt an act affect its character; and that, when it

is attempted to charge a principal for the acts of a subordinate, it becomes not only relevant but material to show what influences the former has brought to bear upon the latter.

It is proved, for instance, in the Case of the United States, that the Florida was armed at Green Cay in British waters. Her Majesty's Government replies "that over such a dominion as the Bahamas, no Government could reasonably be expected to exert such a control as to prevent the possibility that acts of this kind might be furtively done in some part of its shores or waters."[1]

The general allegation that acts committed furtively, in remote and unfrequented parts of a coast, against the wishes of a Government, and in spite of well-intended, active efforts to prevent them, are not acts over which that Government could reasonably be expected to exert a control, commands the assent of the United States. They would not themselves consent to be held responsible for the results of such acts. It happens, however, that each Government has furnished the Arbitrators with proof that there was a controlling bias at Nassau in favor of the insurgents and against the United States; and Her Majesty's Government furnished the additional proof that this bias resulted from a similar bias which was supposed to exist in the Government and people of England. It certainly must be relevant for the United States to show that such a bias did actually exist in England; that it was openly shown by different members of Her Majesty's Government; and that their views could not but have been known, not only to the colonial authorities at Nassau, but also to the British subordinates at Liverpool, Glasgow, Melbourne, Bermuda, and the Barbados. Whether the acts or omissions of their subordinates which resulted disastrously to the United States were influenced by the known wishes of their superiors, and whether the expression of those wishes was not therefore an absence of due diligence, is a legitimate subject for argument by the Counsel of the United States.

Lord Westbury acknowledged the relevancy of such evidence when he said, "the animus with which the neutral acted is the only true criterion."[2]

Lord Westbury.

Mr. Montague Bernard acknowledged it when he said, "injurious remissness or injurious inattention on the part of a Government is not merely something less than the greatest possible promptitude or the greatest possible care." "It has not been usual in international questions to scrutinize narrowly the circumstances from which negligence might be inferred and complaints of actual negligence have been urged but rarely, and with a view rather to security for the future than to reparation for the past. These considerations are indeed plain and obvious, and the Government of the United States is probably not insensible to them, since it is at pains to insist that the neglect with which it charges the Government of Great Britain was 'gross,' 'inexcusable,' and 'extreme,' 'equivalent or approximate to evil intention.'"[3]

Mr. Montague Bernard.

Earl Russell was of the same opinion when he said: "It appears to Her Majesty's Government that there are but two questions by which the claim of compensation could be tested. The one is: Have the British Government acted with due diligence, or in other words with good faith and honesty, in the maintenance of the neutrality they proclaimed? The other is, have the law-officers of the Crown properly understood the Foreign-Enlistment Act, when they de-

Earl Russell.

[1] British Counter Case, pp. 78, 79.

[2] Am. Case, p. 101.

[3] Neutrality of Great Britain during the American Civil War, pp. 385, 387.

clined in June, 1862, to advise the detention and seizure of the Alabama, and on other occasions when they were asked to detain other ships building or fitting in British ports."[1]

Her Majesty's Government itself, when it framed its Case, had not arrived at the conclusion put forth in its Counter Case. It then said:

The British Case.

A charge of injurious negligence on the part of a sovereign Government, in the exercise of any of the powers of sovereignty, needs to be sustained on strong and solid grounds. Every sovereign Government claims the right to be independent of external scrutiny or interference in the exercise of these powers; and the general assumption that they are exercised with good faith and reasonable care, and that laws are fairly and properly administered, an assumption without which peace and friendly intercourse could not exist among nations, ought to subsist *until it has been displaced by proof to the contrary.*[2]

The Counsel of the United States will therefore go into the discussion of the questions of fact as to the several vessels with the fact uncontroverted, that Her Majesty's Government and the individual members of it freely, repeatedly, and publicly gave it to be understood that it was neither expected nor desired in the Cabinet at London, that the United States should succeed in averting the destruction of their nationality; and that these expectations and desires were known to all subordinates of Her Majesty's Government.

The facts stated in the American Case to be considered as proved.

The United States also presented with their Case evidence to show that, at the commencement of the insurrection, the insurgents established on British soil administrative bureaus for the purpose of making British soil and waters bases of hostile operations against the United States; and that from these bureaus and through persons acting under their directions, or in co-operation with them, the several vessels of whose acts they complain were either dispatched from Great Britain, or were supplied in British ports with the means of carrying on war against the United States. They further showed that the existence of these bureaus was brought to the knowledge of Her Majesty's Government and was justified by it.

Proof submitted with the American Case of the systematic and official use of British territory by the insurgents, with the knowledge of Great Britain.

Of a portion of this evidence, which Her Majesty's Government sees fit to style "a mass of confederate papers," the British Counter Case says: "of the authenticity of them, and of the manner in which they came into the possession of the United States, Her Britannic Majesty's Government has no knowledge whatever beyond what it derives from the above-mentioned statement, *which it willingly accepts as true.* Of the person by whom, and the circumstances under which, the letters were written, and the character and credibility of the writers, it (Her Majesty's government) knows nothing whatever. They are persons with whom this Government has nothing to do, and whose very existence was unknown to it; and it does not admit as evidence against Great Britain any statement which they may have made to those who employed them, or to one another."[3] "It is not, indeed it could not, be pretended that the correspondence extracted from these papers was in any way known to the British Government. Nor has the Government of the United States furnished the Arbitrators with any means of judging whether the letters are authentic, or the facts stated in them true, or the persons whose names purport to be attached to them, (persons unknown to the British Government,) worthy of credit. Her Majesty's Government thinks it right to say that it attaches very little credit to them."[4]

[1] Brit. App., vol. iv, paper v, p. 31.
[2] Brit. Case, p. 166.
[3] British Counter Case, p. 3.
[4] Ibid., p. 56.

The Arbitrators may, therefore, assume, notwithstanding the averment on page 56, that Her Majesty's Government admits that the evidence referred to came into the possession of the United States by capture at Richmond, and that there is no serious question of the authenticity of the letters. They may also assume that there will be no serious question made as to the truth of the facts stated in those letters. It is true that Her Majesty's Government says that it attaches little credit to them. It is equally true that the United States attaches full faith to them. The Arbitrators will judge whether it is probable or improbable that these free and confidential letters do give correct accounts of the contemporaneous events which they describe. They will also judge whether those events are or are not relevant to the issue between the two Governments. The United States think that they are. If they are relevant the United States are justified in bringing them before the Tribunal, especially as it appears that Her Majesty's Government was several times informed of the illegal operations which the writers of these identical letters were carrying on from British soil at the time when the letters were written.

These facts also to e taken as proved.

We, therefore, contend that we go into the discussion of the questions of fact, with the further general facts proved, that the insurgents established and maintained unmolested throughout the insurrection administrative bureaus on British soil, by means of which the several cruisers were dispatched from British ports, or were enabled to make them the basis of hostile operations against the United States, and that Her Majesty's Government was cognizant of it.

VI.—THE FLORIDA.

We now proceed to refer the Arbitrators to the evidence upon which the Government of the United States relies as applicable to the case of each vessel separately. We begin with the Florida. The Florida at Liverpool.

This vessel, under the name of the Oreto, was built at Liverpool, England, and sailed from that place on the 22d of March, 1862, without any attempt at her detention by Great Britain. She was in construction and outfit evidently adapted to warlike use.

On the 18th of February Mr. Adams, in behalf of the United States, submitted to Earl Russell, for his consideration, "the copy of an extract of a letter," addressed to him by the consul of his Government at Liverpool, "going to show," as he said, "the preparation at that port of an armed steamer, evidently intended for hostile operations on the ocean."[1] Information by Mr. Adams.

This communication from Mr. Adams was, on the next day, referred by Earl Russell to the Lords Commissioners of the Treasury that being the appropriate department of Her Majesty's Government for such reference.[2] This department at once called upon the Collector of Customs at Liverpool for information, and by his direction the vessel was inspected by a government inspector, who, on the 21st of February, reported that she was "a splendid steamer, suitable for a dispatch-boat, pierced for guns, but has not any on board, nor are there any gun-carriages."[3] The builders were W. C. Miller & Sons, one of the firm being a government officer, "the Chief Surveyor of Tonnage" at that port.[4] Action of Her Majesty's government.

This firm, on being applied to by the collector for information, said, "We have built the dispatch-vessel Oreto. * * * She is pierced for four guns. * * * She is in no way fitted for the reception of guns as yet; nor do we know that she is to have guns whilst in England."[5]

On the same day these reports of the Surveyor and builders were transmitted by the Collector to the Commissioners of Customs, with the statement that "the vessel is correctly described" in the note of the builders.[6]

On the 22d of February, the Commissioners of Customs reported to the Lords Commissioners of the Treasury that "the Oreto is pierced for four guns; but she has as yet taken nothing on board but coals and ballast. She is not, at present, fitted for the reception of guns, nor are the builders aware that she is to be supplied with guns while she remains in this country."[7]

A copy of this report was furnished by the Lords Commissioners of the Treasury on the 24th of February to Earl Russell, and he transmitted a copy to Mr. Adams on the 26th.[8]

On the 22d of March, the vessel sailed from Liverpool, and on the

[1] British Case, p. 53.
[2] Brit. Case, p. 54.
[3] Ibid., p. 55.
[4] Ibid., p. 54.
[5] Ibid.
[6] Ibid.
[7] Ibid.
[8] Ibid, p. 55.

She was then evidently a man-of-war.

28th of April arrived at Nassau, in the island of New Providence, one of the Bahamas, and within the jurisdiction of Her Majesty's Government.[1]

On the 13th of June, while still at Nassau, she was visited by Commander Hickley of Her Majesty's ship Greyhound, with several of his officers. The captain of the Oreto, on being inquired of by Commander Hickley, in the presence of the officers of the Greyhound and three of her own "whether she [the Oreto] had left Liverpool fitted in all respects as she was at present," replied "Yes, in all respects;" and "that no addition or alteration had been made whatever."[2] Captain Duguid, the master of the Oreto himself, on his examination as a witness before the Vice-Admiralty Court at Nassau on the 26th of July, three months after her arrival, testified: "The fittings of the Oreto from the time of her quitting Liverpool up to the present time are the same, with the exception of a little alteration in the boats' davits. Four of them were lengthened two feet. That is the only alteration since she left Liverpool."[3] Duggan, the chief officer, testified to the same effect.[4]

On the 30th of April, only two days after her arrival at Nassau, she was examined by Commander McKillop, of Her Majesty's ship Bulldog, then the senior naval officer in command at that station, and he, on the same day, reported to the Secretary of the Admiralty that "a very suspicious steamer, the Oreto, evidently intended for a gun-boat, is now at the upper anchorage under the English flag; but as there are no less than three cargoes of arms and ammunition, &c., united to run the blockade, some of these guns, &c., would turn her into a privateer in a few hours."[5]

On the 28th of May Commander McKillop, in a communication to the Governor of the Bahamas, reported her as "apparently fitting and preparing for a vessel of war."[6] And again, on the 6th of June, in another communication to the same officer, he says, "I have visited the screw-steamer Oreto, and examined her. She is fitted in every way for war purposes, magazines, shell-rooms, and other fittings, totally at variance with the character of a merchant vessel * * * The captain does not deny that she is intended for a war-vessel."[7] And on the 8th of the same month, in a letter to the Colonial Secretary, he says, "In my letter of the 17th instant [ultimo ?] I made His Excellency aware of the war-like character of that vessel, and I am of opinion that she is not capable of taking in any cargo, having no stowage."[8]

The letter of the 17th referred to is not produced, but on the 13th of June Commander Hickley (who had succeeded Commander McKillop in command at the station) and the principal officers of his ship, after having visited and examined the vessel, certified to the Governor that "the Oreto is in every respect fitted as a man of war, on the principle of the dispatch gun-vessels in Her Majesty's naval service. That she has a crew of fifty men, and is capable of carrying two pivot guns amidships and four broadside both forward and aft, the ports being made to 'ship and unship,' port bars, breeching, side-tackle, bolts, &c.; that she has shell-rooms, a magazine and light rooms, and handing-scuttles for handing powder out of the magazine, as fitted in the naval service, and

[1] Brit. Case, pp. 58 et 61.
[2] Ibid., p. 63.
[3] Brit. App., vol. i, p. 49.
[4] Brit, App., Counter Case, vol. v., p. 37.
[5] Brit. App., vol. i, p. 11.
[6] Brit. App., vol. i, p. 16.
[7] Ibid., p. 20.
[8] Ibid.

shot-boxes for Armstrong shot, or shot similar to them. Round the upper deck she has five boats, (I should say,) a ten-oared cutter, an eight-oared cutter, two gigs and a jolly-boat, and davits for hoisting them up; her accommodation being in no respect different from her similar class of vessels in the Royal Naval service."[1]

Again on the 15th of June, in a further communication to the Governor, the Commander says:

These circumstances, her long detention in this port, her character, her fittings, convinced as I am also that during her stay in the port arrangements have been made for arming her outside, * * her evident equipment for war purposes, * * and my conviction, as also that of my officers and men that have been on board of her, that she is built intently for a war-vessel and not for a merchant ship, make it incumbent on me to seize the Oreto as a vessel that can be no more considered as a free-trader, but that she is, on the contrary, calculated to be turned into a formidable vessel of war in twenty-four hours; and that this I am convinced will be the case if she is permitted to leave Nassau. And, therefore, in her present state, a vessel under British colors, sailing from hence in such an equipped state to a professional eye, that I consider it would be a downright neglect of duty on my part to permit her proceeding to sea, without again urging most strongly on your Excellency the expediency of taking charge of her, as an illegally equipped British vessel, as in my professional capacity, as also in the opinion of my officers, it is impossible to consider her as any other, she being a *bona fide* vessel of war on our royal naval principle.[2]

And still again on the 16th, in another communication to the Governor, he says:

On the Oreto I have repeated my professional opinion, as also that of my officers, and I still have to express my conviction that she is a vessel of war that can be equipped in twenty-four hours for battle, and that she is now going out of the harbor as nearly equipped as a vessel of war can be without guns, arms, and ammunition.[3]

This evidence is taken, as the arbitrators will notice, exclusively from that furnished by Her Majesty's Government in its Case, Counter Case, and accompanying documents; and the United States submit, it shows, beyond any controversy, that on the 18th of February, the date of Mr. Adams's communication to Earl Russell, the Oreto was a vessel specially adapted to warlike use; that this fact was apparent upon an inspection of the vessel herself; that she had been constructed and so "specially adapted" within the jurisdiction of Her Majesty's Government, and that she still remained in that jurisdiction.

She was intended to cruise or carry on war against the United States, and Her Majesty's Government had reasonable grounds so to believe.

Character of Mr. Adams's representation.

Mr. Adams, with his communication to Earl Russell on the 18th of February, submitted an extract from a letter of the Consul of the United States at Liverpool, in which it is said: "Mr. Miller, who built the hull, says he was employed by Fawcett, Preston & Co., and that they own the vessel. * * Frazer, Trenholm & Co. have made advances to Fawcett, Preston & Co., and Miller, the builder."[4] And Mr. Adams in his note to Earl Russell says, "From the evidence furnished in the names of the persons stated to be concerned in her construction and outfit, I entertain little doubt that the intention is precisely that indicated in the letter of the Consul, the carrying on war against the United States. * * Should further evidence to sustain the allegations respecting the Oreto be held necessary to effect the object of securing the interposition of Her Majesty's Government, I will make an effort to procure it in a more formal manner."[5]

This communication was not accompanied by any evidence that could

[1] Brit. App., vol. i, p. 23.
[2] Brit. App., vol. i, p. 24.
[3] Ibid., p. 26.
[4] Brit. Case, p. 53.
[5] Ibid.

be made available in the courts of Great Britain. It was what it purported to be, a mere "statement of belief." If Earl Russell desired further evidence to be furnished by the United States, he was invited so to say in reply. He did not, but in his reply on the 19th contented himself with acknowledging the receipt of the communication, and stating that he had "lost no time in communicating with the proper department of Her Majesty's Government on this subject."[1]

Action of the British government.

On the 21st of February the builders reported to the Collector at Liverpool, "We have built the dispatch vessel for Messrs. Fawcett, Preston & Co., engineers of this town, who are the agents of Messrs. Thomas Brothers, of Palermo, for whose use the vessel, we understand, has been built. * * Mr. Thomas, of the firm at Palermo, frequently visited the ship while she was being built. * * We have handed her over to the engineers, and have been paid for her. According to the best of my information the present destination of the vessel is Palermo; and we have been asked to recommend a Master to take her out to Palermo."[2]

Thus one of the firms suspected by Mr. Adams is shown, by the statement of the builders, to have been concerned in her construction and outfit. On the same day, the collector transmitted this communication from the builders to the Commissioners of Customs, with a further statement of his own, viz: "I have every reason to believe that she is for the Italian Government, and not for the Confederates."[3]

He gave no facts upon which he predicated his belief, and it will be noticed that there is nothing in the builders' statement to justify such a belief. All the builders state is that they understood she was built for the "use of" a firm in Palermo, and that, according to the best of their information, her present destination was Palermo. Fawcett, Preston and Company were at the time "a firm of engineers and founders," "carrying on an extensive trade" at Liverpool,[4] but no inquiries appear to have been addressed to them. They were, as the builders said, the "agents" of the firm for whose "use" they "understood" the vessel was built, and were certainly likely to know for whose "use" she *actually* was built. It had already been urged against this firm "that they had been concerned in a shipment of arms for the Confederate States."[5] There does not seem to have been any good reason why Her Majesty's Government might not have addressed an inquiry to them, yet for some reason it did not, or, if it did, the result has not been reported.

What might have been done.

On the 22d of February, the Commissioners of Customs reported to the Lords Commissioners of the Treasury that they had instructed the "Collector at Liverpool to make inquiries in regard to the vessel Oreto, and it appears from his report that she has been built by Messrs. Miller & Sons for Messrs. Fawcett, Preston & Co., engineers of Liverpool, and is intended for the use of Messrs. Thomas Brothers, of Palermo, one of that firm having frequently visited the vessel during the process of building. The Oreto is pierced for four guns. * * The expense of her construction has been paid, and she has been handed over to Messrs. Fawcett and Preston. Messrs. Miller & Sons state their belief that her destination is Palermo, as they have been requested to recommend a master to take her to that port;

What actually was done.

[1] Brit. App., vol. i, p. 2.
[2] Brit. Case, p. 54.
[3] Ibid.
[4] Brit. Case, p. 55; Brit. Counter Case, p. 75.
[5] Brit. Counter Case, p. 75.

and our Collector at Liverpool states that he has every reason to believe that the vessel is for the Italian Government. We beg further to add, that special directions have been given to the officers at Liverpool to watch the movements of the vessel, and that we will not fail to report forthwith any circumstance which may occur worthy of your Lordship's cognizance."[1]

It will be here observed, that the report does not state it was only understood by Miller & Sons that the vessel was intended for the use of Thomas Brothers, but it appeared from the report that she was so intended. Neither does it appear that inquiries had not been addressed to Fawcett, Preston & Co.; but it did appear that "special directions" had been given to the officers at Liverpool to watch the movements of the vessel, and that prompt report would be made whenever circumstances worthy of their Lordships' cognizance might occur.

This report was transmitted by the Secretary of the Treasury to Earl Russell on the 24th;[2] and by Earl Russell to Mr. Adams on the 26th of February.[3] The statements of the officers and builders on which the report was predicated were not sent with it. Earl Russell in transmitting the report did not intimate any desire that Mr. Adams should make an effort to procure further evidence.[4] But on the same day of its date he (Earl Russell) telegraphed to Her Majesty's Minister at Turin as follows: "Ascertain and report to me whether a vessel called the Oreto, now fitting out at Liverpool, is intended for the use of the Italian Government."[5] On the 1st of March the Minister at Turin replied: "Ricasoli tells me that he has no knowledge whatever of the ship Oreto, but will cause inquiry to be made."[6] No inquiries appear to have been addressed to the representative of His Majesty, the King of Italy, in London, or to his consul at Liverpool, and no further information was received from the Minister at Turin until after the vessel had sailed.

On the 1st of March, the same day with the receipt of the reply from the Minister at Turin, John H. Thomas, of Liverpool, "a natural-born British subject, born at Palermo, in the island of Sicily, of British parents," declared in writing in the presence of the Registrar of Shipping at the port of Liverpool (one of the officers of the Government specially charged with the registry of vessels[7]) that he was "entitled to be registered as owner of sixty-four shares (the whole) of said ship. To the best of my knowledge and belief, no person or body of persons other than such persons or bodies of persons as are by the Merchant Shipping Act, 1854, qualified to be owners of British ships, is entitled as owner to any interest whatever, either legal or beneficial, in the said ship."[8]

This declaration was made in accordance with the provisions of section 38 of the Merchant Shipping Act, 1854, of Great Britain,[9] to obtain the registry of the ship as a British vessel. Without it the Registry could not have been granted, for none but natural-born British subjects and persons made denizens by letters of denization, or naturalized, could be owners of a British ship.[10] Registry of the Florida.

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[1] Brit. Case, p. 54.
[2] Ibid.
[3] Ibid., p. 55.
[4] Brit. App., vol. i, p. 3.
[5] Brit. App., vol. i, p. 3.
[6] Brit. Case, p. 55.
[7] Merchant Shipping Act, 1854.
[8] Brit. Case, p. 56.
[9] Am. App. Counter Case, p. 1138.
[10] Mer. Ship. Act, 1854, sec. 18; App. Am. Counter Case, p. 1132.

Upon this declaration the vessel was, on the 3d of March, registered as a British vessel, at the port of Liverpool, under the name of the Oreto.[1] This Registry was made in one of the public records, by an officer of the Government specially charged with that duty.[2]

Clearance.

On the 4th of March the Oreto was cleared at Liverpool in ballast, with a crew of fifty-two men, for Palermo and Jamaica.[3] This clearance must have been obtained from the office of the Collector of Customs at Liverpool.[4] To be regular it should have been signed by the Collector or Comptroller,[5] but that formality seems, in this particular instance, to have been omitted.[6]

On the 3d and 4th of March, shipping articles, in accordance with the form sanctioned by the Board of Trade, August, 1860, in pursuance of 17 and 18 Victoria, c. 104,[7] were signed by the master and all the crew who sailed in the vessel, except two who signed as substitutes on the 14th and 15th, in presence of J. W. Hughes, shipping master at the port of Liverpool.[8] These shipping articles specified a voyage from Liverpool to Palermo, thence (if required) to any port or places in the Mediterranean Sea and the West Indies, and back to a final port of discharge in the United Kingdom, the term not to exceed six months. In the same articles, in accordance with the prescribed form, the vessel is described as having been registered at the port of Liverpool, March 3, 1861; and Fawcett, Preston & Co. are named as "managing owners."[9] Shipping articles, by the terms of the "Merchant Shipping Act, 1854," are required to be signed in duplicate in the presence of the shipping master, whose duty it is to "cause the agreement to be read over and explained to each seaman, or otherwise ascertain that each seaman understands the same before he signs it, and to attest each signature."[10] One part of the articles, thus in duplicate, must be retained by the shipping master, who is an officer of the Government, and who has a public office, known as the "shipping office."[11]

All this formality was gone through with in this case, as will be seen by a copy of the articles actually signed in the "shipping office" and before a "shipping master," found in the Appendix to the British Case, vol. i, p. 161.

Resume.

Thus then stood the facts known to Her Majesty's Government on the 4th of March, eighteen days before the Oreto sailed. She was designed for war purposes. That was evident. She was for the use of some government, though registered in the name of a British subject. She did not belong to Her Majesty's Government, and it was not "believed" or "suspected" that she belonged to or was intended for any other Government than that of Italy or the insurgents.

There were certainly circumstances of strong suspicion against her Italian ownership or destination. Mr. Adams based his opinion of her destination to the confederates directly upon the fact that he understood Fawcett, Preston & Co. and Frazer, Trenholm & Co. had been concerned in her construction and outfit. This last firm, he informed Earl

[1] Brit. App., vol. i, p. 10.
[2] Mer. Ship. Act, 1854, sec. 42; Am. App. Counter Case, p. 1141.
[3] Brit. Case, p. 56.
[4] Brit. Case, p. 57; Customs Consolidation Act, 1853, sec. 142; App. Am. Counter Case, p. 1163.
[5] See sec. 142 above.
[6] Brit. Case, p. 56.
[7] Mer. Ship. Act, 1854, sec. 8.
[8] Brit. App., vol. i, p. 161.
[9] Brit. App., vol. i, p. 161.
[10] Mer. Ship. Act, sec. 150; App. Am. Counter Case, p. 1155.
[11] Ibid., sec. 122; App. Am. Counter Case, p. 1151.

Russell as early as the 15th of August, 1861, was "well known to consist in part of Americans in sympathy with the insurgents of the United States."[1] In point of fact, only one of the partners resided in Liverpool, and he was a native of South Carolina, who, on the 13th of June, 1863, applied to Her Majesty's government for a certificate of naturalization.[2] The other members of the firm were at the time actual residents of the State of South Carolina. One of them, afterward the Secretary of the Treasury of the insurgents, was, on the 5th of August, 1861, (as appears by the public records in the office of the Registrar of Shipping at Liverpool,) authorized by a "certificate of sale," from her owner in Liverpool, to sell the ship Bermuda at any place out of the United Kingdom. This certificate of sale also described him as "of Charleston, in the State of South Carolina," one of the ports at the time closed by the blockade of the United States.[3] It was upon the occasion of a complaint by Mr. Adams as to this very vessel that he communicated to Earl Russell the relations of this firm with the insurgents.

The builders stated that Fawcett, Preston & Co. contracted with them for the building, and the records showed that they were the "managing owners," directing the preparations for her departure after Mr. Adams's complaints had been made known. No inquiry had been made of them. Mr. Adams stated she had been paid for by Frazer, Trenholm & Co. Her builders stated they had been paid, but omitted to say by whom.

In fact no inquiry suggested by Mr. Adams had been made, and, although he had been assured that the movements of the vessel "should be watched," no single thing appears to have been done by any officer of the Government at the port of Liverpool after the reports of the 21st of February, or at London after the telegram of Earl Russell to the Minister at Turin on the 26th, until the vessel had been permitted to sail under a clearance granted in the face of so many attending circumstances of suspicion.

On page 55 of the British Case, after a recapitulation of the facts which had been developed up to the 1st of March, it is said, "No further information could be obtained by Mr. Adams or was received by Her Majesty's Government up to the time of the sailing of the ship." Mr. Adams had not been called upon to act further, and he had been assured that "special directions had been given to the officers at Liverpool to watch the movements of the vessel."

It may be literally true that no other information had been received by Her Majesty's Government. The officers at Liverpool seem to have taken their "special directions" literally, and watched only the "movements of the vessel," but the United States submits that if Her Majesty's Government did not receive further information, it was because it failed to use the means within its power to become better informed. It had been put upon inquiry, and was negligent if it did not act.

Negligence of British officials.

What might it have done? On the 3d of March the vessel became a "registered British vessel," and subject to the laws in force in the kingdom for the government and control of such vessels. Her ostensible owner was a British subject residing at Liverpool. Her "managing owners" were "a firm carrying on an extensive trade at Liverpool."[4] Frazer, Trenholm & Co. had a business office at Liverpool, and at least one of the partners (Prioleau) resided there.[5]

[1] Brit. App., vol. ii, p. 133.
[2] Brit. App., vol. v, p. 202.
[3] Brit. App., vol. ii, p. 136.
[4] Brit. Case, p. 75.
[5] Brit. App., vol. v, p. 202.

What might have been done under the merchant's shipping act.

The Merchant Shipping Act, 1854, under which the vessel was registered, provided[1] that "if any unqualified person * * acquires, as owner, any interest, either legal or beneficial, in a ship using a British flag and assuming the British character, such interest shall be forfeited to Her Majesty," and "if any person on behalf of himself or any other person or body of persons, wilfully makes a false declaration touching the qualification of himself or such other person or body of persons to own British ships, or any shares therein, the declarant shall be guilty of a misdemeanor, and the ship or share in respect of which such declaration is made, if the same has not been forfeited under the foregoing provision, shall, to the extent of the interest therein of the person making the declaration, * * be forfeited to Her Majesty."

The same Act[2] provides that "the Board of Trade" (one of the departments of Her Majesty's Government)[3] may, from time to time, whenever it seems expedient to them so to do, appoint any person as an inspector, to report to them upon the following matter, that is to say: * * *

"2. Whether the provisions of this Act or any regulations made under or by virtue of this Act have been complied with." And by section 15, "every such inspector as aforesaid shall have the following powers, that is to say: * * * * * *

"3. He may, by summons under his hand, require the attendance of all such persons as he thinks fit to call before him and examine for such purpose, and may require answers or returns to any inquiries he thinks fit to make.

"4. He may require and enforce the production of all books, papers, or documents which he considers important for such purpose.

"5. He may administer oaths, or may, in lieu of requiring or administering an oath, require every person examined by him to make and subscribe a declaration of the truth of the statements made by him in his examination."[4]

This was machinery in the hands and under the control of the officers of Her Majesty's Government. It could not be managed or controlled by any of the officers of the Government of the United States. Here certainly were circumstances brought to the knowledge of the officers of Her Majesty sufficient to create at least a strong suspicion that some of the provisions of the Merchant Shipping Act had been violated, and an inspector might with propriety have been appointed and an inquiry instituted by him.

The builders, Fawcett, Preston & Co., Frazer, Trenholm & Co., and Thomas, if necessary, might have been called to give information; and, if called, Prioleau (one of the firm of Frazer, Trenholm & Co.) would have been compelled to state, as he did subsequently state under oath,[5] that the contract for the building was made with Fawcett, Preston & Co. by James D. Bullock, who acted in England as the "agent of the Navy Department" of the insurgents; and that she was paid for through Frazer, Trenholm & Co., who were at the time the "financial agents" of the insurgents in Liverpool. He would also undoubtedly have been compelled to state (as did Mr. George D. Harris, of the firm of H. Adderly & Co., afterward on the trial before the Vice-Admiralty Court at Nassau) that his firm at Liverpool consigned her, on her departure

[1] Sec. 103, sub. 3, 4; App. Am. C. Case, p. 1148.
[2] Sec. 6; Am. C. Case. App., 1127.
[3] Sec. 14; Am. C. Case, App., 1129.
[4] Sec. 14; Am. C. Case, App., p. 1129.
[5] Am. App., vol. vi, p. 187.

from that port, to the firm of H. Adderly & Co. at Nassau; and in accordance with facts which have been subsequently developed, he must have been compelled to testify that, at the time of her registry she was in fact owned by the insurgent government, and was about to sail from Liverpool for its use.

Fawcett, Preston & Co. would have been compelled to testify that they contracted with Bullock for the construction of the vessel; that they did not, in their contract with Miller & Sons, act as the agents of Thomas Brothers; and that she was not intended for the Italian Government, but for the insurgents. They would also have been compelled to testify that at the very time they had themselves completed her armament, and were shipping it upon the Bahama (a vessel placed at the disposal of the agents of the insurgents for that purpose by Frazer, Trenholm & Co.[1]) for transfer at Nassau, or some other port that might be agreed upon.[2]

Upon this information being thus obtained, Mr. Edwards, the Collector, would readily call to his mind the fact that, as early as the 4th of July, 1861, the Acting Consul of the United States at Liverpool had addressed him by letter as follows: "From information I have received, I have reason to believe that a person named Bullock has come to England for the purpose of procuring vessels to be fitted as privateers to cruise against the commerce of the United States, and that he will make Liverpool the scene of his operations."[3]

It is true, as is said in the British Counter-Case, that in a court of justice in Great Britain, and, probably, before this tribunal instituted under the Merchant Shipping Act, a witness cannot be compelled to answer any question which would expose him to a penalty or to a prosecution for an offense against the law; but it is just as true that this is a privilege personal to the witness himself, and that the Government need not refrain from calling upon one of its subjects to testify, because he might elect to avail himself of such a privilege.

In view of these facts the United States ask the attention of the Arbitrators to the following statement in the Counter-Case of Her Majesty's Government: "In truth, these open and notorious facts do not appear to have been discovered till long afterward, even by the industrious researches of the Government and subordinate officers of the United States."[4] The arbitrators will look in vain for any evidence of "industrious researches" by the Government or subordinate officers of Great Britain. A builder who knew nothing was inquired of and he gave his "understanding." A Collector expressed his "belief," and there the "researches" ended.

Again, on page 75 of the British Counter Case is this statement:

> What the Government did on receiving Mr. Adams's representations is stated in the British Case. Inquiry was instantly directed, but no information whatever could be obtained tending to connect the vessel in any way with the Confederate States. She was declared by the builder to be ordered for a firm in Palermo, a member of which was registered on his own declaration as her sole owner, and had frequently visited her when building. * * * Her first destination, as stated in her clearance, was Palermo, and her crew were nominally (and, as they evidently believed, really) hired for a mercantile voyage. On the one hand were the positive statements of the builder, the registered owner, and the Collector of Customs; on the other, the suspicion of Mr. Dudley that the vessel was still intended by her owner to pass sooner or later into the hands of the Confederate Government.

[1] British App., vol. i, p. 178.
[2] Letter from Major Huse to Gorgas, March 15, 1862, Am. App., vol. vi, p. 69.
[3] Am. App., vol. vii, p. 72.
[4] Brit. C. Case, p. 74.

Inquiry was indeed instituted on the 19th of February, but it stopped on the 26th, and was never directed to the sources of suspicion indicated by Mr. Dudley. In fact, on the 26th of February every officer of Her Majesty's Government, that the United States were assured would be on the "watch," appears to have closed his eyes and to have left the vessel and her owners entirely to themselves.

Arrival at Nassau.

On the 28th of April the Oreto arrived at Nassau. She was still a British ship, with a British registry, under the British flag, and in a British port.

Conduct of British officials there.

On the 30th of April Commander McKillop, in his report to the Admiralty, says she is "under the English flag."[1] Governor Bayley, in his letter to Commander McKillop, on the 3d of June, says: She "is a registered British vessel and carries the British flag,"[2] and Commander Hickley, on the 15th of June, in his letter to the Governor, refers to her as "a vessel under British colors."[3]

As has been already seen, she was then evidently a vessel of war, and specially adapted to warlike purposes.

Her Majesty's Government, at this time, certainly had reasonable grounds to believe she was intended to cruise and carry on war against the United States.

On the 9th of May Governor Bayley indorsed on a letter to him of that date from Mr. Whiting, the Consul of the United States,[4] the following statement: "For coupling that fact with the description given me by the Captain of H. M. ship Bull-dog, of the build of the Oreto, I cannot fail to infer that she is a vessel of war intended to act against the United States."[5] On the same day he caused a letter to the same effect to be addressed to H. Adderly & Co.[6]

And again on the 21st of June, in his report to the Duke of Newcastle, he says: "Throughout these occurrences I was averse from proceeding to extremities. Not that I considered the conduct of the Oreto to be entirely free from suspicion, or indeed from discourtesy to a neutral government."[7] How was Great Britain neutral to the Oreto, a British ship, under British colors? And in the same letter, he says Commander Hickley informed him "her real destination was openly talked of."[8] Again, "Her Majesty's Government is informed and believes that during the blockade of the insurgent States it was a common practice for ships leaving the port of Nassau, with the intention of endeavoring to run their cargoes into the blockaded ports, to clear for St. John's, New Brunswick."[9] "Early in the month of June, 1862," (about the 4th,) "the consignees of the vessel, who were a mere mercantile firm at Nassau, applied to the Receiver-General (the proper officer for that purpose) for permission to load her for an outward voyage to St. John's, New Brunswick."[10] At this time she was, according to the opinion of Commander McKillop, "not capable of taking in any cargo, having no stowage." On the 9th she commenced taking in a cargo of "arms and ammunition, including some boxes of shells," (not likely to be of much use at St. John's,) but, being visited by Commander Hickley, discharged her cargo and cleared for Havana in ballast.[11]

Want of due diligence.

At Nassau, then, the Government certainly not only had reasonable grounds to believe, but actually did believe, that she was intended to cruise against the United States.

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[1] Brit. App., vol. i, p. 11.
[2] Ibid., p. 18.
[3] Ibid., p. 24.
[4] Brit. Case, p. 61.
[5] Brit. App. Counter Case, vol. v, p. 35.
[6] Brit. App., vol. i, p. 15.
[7] Brit. App., vol. 1, p. 13.
[8] Ibid.
[9] Brit. Case, p. 63.
[10] Ibid.
[11] Ibid., p. 63.

Under the Rules of the Treaty, Her Majesty's Government was bound to use "due diligence" to detain the vessel at Nassau, as well as at Liverpool. This was not done, but she was permitted to clear for St. John's,[1] when that was equivalent, according to the practice which prevailed at that port, to a clearance for the insurgent States.

But it is claimed by Her Majesty's Government "that the Florida was seized while at Nassau, on charge of a violation of the Foreign-Enlistment Act; that proceedings were, by the Governor's direction, instituted in the proper court, with a view to her condemnation, and that after a regular trial she was ultimately released by a judicial sentence."[2]

It is also said, on p. 78 of the British Counter Case, that the Vice-Admiralty Court "was a Court of competent jurisdiction; the authorities of the Colony were bound to pay obedience to its decree; and, as soon as it was pronounced the persons claiming the possession of the vessel were entitled to have her immediately released." Judicial proceedings at Nassau.

As between the claimants of the vessel and Her Majesty's Government seeking to enforce a forfeiture under the provisions of the Foreign-Enlistment Act, this decree may have been conclusive; but as between the United States and Her Majesty's Government, it has not that effect. The duty of Her Majesty's Government was to use due diligence to prevent the departure of the vessel, because she had been specially adapted to warlike use within its jurisdiction, and was intended to cruise and carry on war against the United States.

She was proceeded against on the sole ground that an attempt had been made to equip, furnish, and fit her out within the jurisdiction of the Bahamas.[3] This is in terms admitted by Attorney-General Anderson in his defense as published in the Counter Case.[4] The judge, in announcing his opinion, says: "Now, to support the libel it is necessary that proof should be given, first, that the aforesaid parties, having charge of the Oreto, while the vessel was within the jurisdiction of the Vice-Admiralty Court of the Bahamas, attempted to equip, furnish, and fit her out as a vessel of war."[5] And again, on page 43 he says: "With respect to acts which were done, or circumstances which occurred on board the Oreto before she came within the jurisdiction of the Bahamas Vice-Admiralty Court, it is admitted, and is clear, that the Court has no authority to adjudicate." And again, on the same page: "Captain Hickley's evidence as to the construction and fittings of the vessel I should consider conclusive, even had there been no other; but that construction and those fittings were not made here, but in England, and of whatever nature they may be, do not subject the vessel to forfeiture here."

The pleadings and the proof showed conclusively that the vessel had been specially adapted to warlike use at Liverpool, and that she was still with a British Registry under the British flag; but in the opinion of the judge, the proof did not show that any act had been done within the jurisdiction of his Court for which he was authorized to decree a forfeiture to Her Majesty.

This decree, therefore, does not operate as a defense to the claim now made against Her Majesty's Government by the United States.

But the United States, on page 343 of their Case, have gone further than this, and said: "If it had been predetermined that the Oreto should be released by going through the form of a trial under the Foreign-Enlistment Act, the steps could not have been better directed for

[1] Brit. App., vol. i, p. 58.
[2] British Counter Case, p. 76.
[3] Brit. App., vol. 1, p. 68.
[4] British Counter Case, p. 77.
[5] Brit. App., vol. i, p. 39.

that purpose." To this the Attorney General of the Colony has been permitted, through the British Counter Case, to make his response that, "this charge is wholly unfounded. Under the circular dispatch of the 15th November, already referred to, the responsibility of initiating proceedings under the Foreign Enlistment Act was placed, and properly so, on the Attorney General of the Colony, and that officer had necessarily to be cautious in advising the institution of proceedings, which, if ultimately unsuccessful, might eventuate in rendering the seizors liable to heavy damages.[1]

It will be observed the Attorney General does not deny, but on the contrary admits, that he was, during all the time the Oreto was at Nassau, the "confidential counsel of Adderly & Co.," and that in a speech made in a trial in another court, which took place after the Oreto was libelled and before the decree was rendered, he said that "the Union of the United States was a myth now fully exploded."[2] He thinks he did not use the words "Yankee fiction," as "the use of words of the sort is not the style of language I am accustomed to adopt," but he admits that he "may have used language embodying the expression of an opinion, which I certainly then entertained, that the Union which the flag was intended to represent had, as far as related to the Southern portion of North America, passed away."[3] Neither is it denied that Harris, one of the firm of Adderly & Co., consignees of the vessel, was one of the Executive Council of the Government of the Colony,[4] or that A. J. Adderly, another partner in the firm, was a member of the Assembly.[5]

Her Majesty's Government admits in its Case,[6] and repeats in its Counter Case,[7] that "in a proceeding *in rem* against a ship, to enforce a forfeiture for an alleged infringement of a Statute, a Court, wherever locally situate within the dominions of the Crown, might lawfully receive and adjudicate upon evidence of such infringement wherever the act or acts constituting it might have been committed." The theory, then, on which the Attorney General founded and conducted his case before the Vice Admiralty Court was erroneous. A vessel specially adapted to warlike use in Liverpool might have been condemned on that cause of forfeiture in the Bahamas, but the Oreto was released.

The Attorney General, who conducted the proceedings, was also confidential counsel of Adderly & Co., when the vessel arrived at Nassau on the 28th of April, consigned to their care.[8] One Heyliger, an agent specially detailed by the insurgents to look after their interests at Nassau,[9] directed her to proceed to Cochrane's anchorage, "there being no Confederate naval officer to take charge of her for the present."[10] She was, however, on that day entered at the Custom House at Nassau in ballast.[11] On the 19th of May the Consul of the United States wrote to the Governor of the Colony that it was "believed, and so reported by many residents here, that she is being prepared and fitted out as a confederate privateer."[12]

The Governor directed an immediate report from the Receiver General

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[1] British Counter Case, p. 77; Brit. App. Counter Case, vol. v, pp. 19, 25.
[2] American Case, page 344.
[3] British App., Counter Case, vol. v, p. 25.
[4] American App., vol. vi, p. 237.
[5] Ibid.
[6] Page 66.
[7] Page 76.
[8] Testimony of Harris, British App., Counter Case, vol. v, p. 40.
[9] Benjamin to Maffitt, American App., vol. vi, p. 57.
[10] Heyliger to Randolph, American App., vol. vi, p. 77.
[11] British App., Counter Case, vol. v, p. 35.
[12] British Case, p. 61.

as to the truth of these allegations, and he, on the same day, reported: "She did not enter the harbor, and now lies at Cochrane's anchorage, and I have no information as to her future proceedings."[1] On the same day the Attorney General was called upon for his opinion, and he reported as follows: "With respect to the Oreto, the Consul's allegation is to the effect that it is believed and reported by many residents here that she is being prepared and fitted out where she now lies at Cochrane's anchorage, which is within the limits of the port of Nassau, as a Confederate privateer. Now if such is the fact, an offense against the Foreign Enlistment Act has been committed, all parties implicated in which are liable to be criminally proceeded against for misdemeanor, and the vessel may be seized by any naval or revenue officer; but to justify proceedings either against the parties or the vessel, the matter must not rest on repute or belief alone, but the authorities must have positive facts to ground their proceedings on, and unless the Consul can adduce such, or they can be obtained through other channels, no steps can be taken either for the arrest of the vessel or those on board of her."[2]

Partial and unfriendly conduct of the colonial authorities.

On the same day the Governor caused a note to be sent by the Colonial Secretary to Adderly & Co., as follows: "I am directed by the Governor to notify to you, that if you are arming or putting arms on board the steamer Oreto, His Excellency will enforce the rules laid down in the Queen's Proclamation, for, coupling that fact with the description given to his excellency by the captain of Her Majesty's ship Bulldog of the build of the Oreto, His Excellency cannot fail to infer that she is a vessel of war intended to act against the United States; and as Her Majesty's Government have expressed their deliberate intention of observing and preserving neutrality in the Queen's possessions, His Excellency will use his strongest efforts to prevent either of the belligerent powers from arming or equipping vessels of war in this port."[3]

To this, upon the next day, Adderly & Co. wrote in reply: "We beg to acknowledge receipt of your communication of yesterday's date informing us that, if we were arming or putting arms on board of the steamer Oreto, His Excellency would enfore the rules laid down in the Queen's Proclamation. In reply, we beg to state, for the information of His Excellency, the Governor, that we have neither attempted to arm or put arms on board of the British steamer Oreto, consigned to our firm, nor are we aware of there being any intention on the part of the owners to arm that vessel."[4]

On the trial before the Judge of the Vice Admiralty Court, Harris, one of the firm, and, as has been seen, a member of the Executive Council, testified: "I told Captain Duguid, very shortly after he arrived here, that they were talking a good deal about the hull of his vessel; mind, do nothing that will have the appearance of equipping."[5]

Here it may not be improper to call the attention of the Arbitrators to a letter from Heyliger, the agent of the insurgents, to their Secretary of War, under the 2d of May, in what he says; "You are aware that she is a gunboat. * * * The Bahama is expected every moment with her armament, and I shall have it speedily transferred, though the matter will have to be delicately managed."[6] The Bahama did afterwards arrive. The United States are unable to give the date of her arrival, but she first appeared at Cochrane's Anchorage, near the Oreto, without any

[1] British App., Counter Case, vol. v, p. 35.
[2] British App., vol. i, page 15.
[3] Ibid.
[4] Brit. App., vol. vi, p. 16.
[5] Brit. App., Counter Case, vol. v, p. 42.
[6] Am. App., vol. vi, p. 234.

entry at the Custom-House or any Custom-House Officers on board.[1] On the 26th the Receiver General advised the Colonial Secretary that he had "every reason to believe the consignees of the British steamer Oreto (which vessel arrived from Liverpool in ballast) intend shipping large quantities of arms, and munition of war as cargo. * * * Probably application may be made to allow cargo from other vessels to be transferred to the Oreto where she now lies."[2]

On the 27th the Bahama entered inwards with Adderly & Co. as consignees.[3]

On the 28th Commander McKillip advised the governor that "several steamers having anchored at Cochrane's Anchorage, I sent an officer yesterday to visit them and muster their crews, and ascertain what they were, and how employed. The officer reports that one steamer, the Oreto, is apparently fitting and preparing for a vessel of war. Under those circumstances I would suggest that she should come into the harbor of Nassau to prevent any misunderstanding as to her equipping in this port contrary to the Foreign Enlistment Act, as a privateer or war-vessel."[4]

On the same day the Governor addressed the Attorney General and desired "to know whether it is contrary to law to order the Oreto to come down to the harbor, as the Commander of the Bulldog has reported her to have the appearance of a privateer arming herself."[5] The Attorney General immediately replied that he was "of opinion that an order for the removal of the Oreto from Cochrane's Anchorage, where she now lies, to the harbor of Nassau should not be made, as such order could not be legally enforced unless it was distinctly shown that such a violation of law had taken place in respect of her as would justify her seizure."[6]

On the next day the Governor, having called for a further and more detailed report upon the same subject, the Attorney General in reply said:

My reply of yesterday was necessarily short, as your note was received at a late hour and I was anxious to send an immediate answer in order that any action in the matter referred to might be prevented. * * Any British or foreign trading vessel has a right, in carrying on her lawful commercial pursuits, to use as anchorage-places any of the harbors, roadsteads, and anchorages in the Colony. * * Beyond exercising the powers conferred on him by the trade laws, His Excellency has no power to compel the removal of the Oreto from her present anchorage, unless some act has been done in respect of her which would constitute a violation of law and subject her to seizure.

This brings me to the question whether there is anything disclosed in your communication which would, in a court of law, justify the forcible removal of the vessel from her present position. The information amounts to this: that the senior naval officer on the station has officially reported to the Governor that this vessel is apparently fitting and preparing for a vessel of war, or, as stated in your note of yesterday, has the appearance of a privateer arming herself. Now, unless Captain McKillop grounds the opinion formed and reported by him on some overt act, such as the placing of arms or other munitions of war on board of the vessel without the sanction of the Revenue Department, or some such similar act, evidencing an intention on the part of the persons in charge of the vessel to fit her out as a vessel of war to be employed in the service of a foreign belligerent Power, the forcible removal of the vessel from her present position, merely to guard against a possible infraction of the law, could not be justified. Such removal would in fact constitute a "seizure," which the parties making would be responsible for in damages, unless they could show a legal justification which must be based upon something beyond mere suspicion.

He then says, while mere suspicion might not be sufficient to authorize a removal, it would justify the placing of "a revenue officer on board of her to watch the proceedings of the parties on board, in order

[1] Ibid., p. 326.
[2] Brit. App., Counter Case, vol. v, p. 35.
[3] Am. App., vol. vi, p. 325.
[4] Brit. App., Counter Case, vol. v, p. 36.
[5] Ibid.
[6] Ibid., p. 37.

that, if any actual contravention of the law took place, it might be at once reported and prompt measures taken by seizure of the vessel and otherwise to punish all parties implicated therein."

Then he says:

I will only now add that I feel that a great measure of the responsibility rests upon me in questions of this nature, and that it behooves me to be particularly cautious in giving any advice which may lead to a course of action on the part of the authorities here which may be considered as contravening the principles enumerated in the circular dispatch of His Grace the Duke of Newcastle, on the 15th of November last, in a part of which it is stated: "If it should be necessary for the Colonial authorities to act in any such case, [*i. e.*, violation of the Foreign Enlistment Act,] it should only be done when the law is regularly put in force, and under the advice of the law-officers of the Crown."[1]

On the next day he wrote to the Colonial Secretary:

I have the honor to acknowledge the receipt of your letter of this day's date, and have to express my regret that His Excellency should have misapprehended the meaning of my letter of yesterday's date, which I certainly never intended should bear the construction which His Excellency appears to have placed on it, and which I respectfully submit a careful perusal will show cannot be placed on it. Any act of arming, or any attempt to arm a vessel in contravention of the Imperial Statute, commonly known as the Foreign-Enlistment Act, will subject the vessel to seizure, and it is quite immaterial in what manner the violation of law is ascertained, or by whose testimony it is established, the only necessary requirement being that the facts testified to should be such as would be received in court of law as legal proof of the violation of the statute sought to be established. With reference to the concluding part of your letter, I can only say that it is far from my wish to dictate to His Excellency the course to be pursued by him, my simple duty being to place before His Excellency my opinion on the state of the law bearing on such points as he may submit for my consideration, and that it is entirely for His Excellency to decide whether he will be guided by my views or not.[2]

The letter of the Colonial Secretary, to which this is a reply, is not given among the documents produced in evidence by Great Britain.

After the receipt of these several letters from the Attorney-General, the Governor addressed a communication to Commander McKillop, under date of June 2, in which he says that the Oreto should not be allowed to arm herself for belligerent purposes within the jurisdiction of the harbor. "But, inasmuch as it is not yet proved beyond doubt that the Oreto is a vessel of war, and as it is just possible that she may be only a merchant ship taking arms and implements of war solely for exportation, it is desirable that a more special and minute examination of her conditions and equipment should be made before she can be treated as a pirate, a privateer, or foreign man-of-war arming within our waters." He therefore requested that such steps should be taken "as in your professional opinion seem best for the purpose of ascertaining the true character of the Oreto and the nature of her equipment; and if, after inspecting her guns, her crew, and the general disposition of the vessel, you are convinced that she is in reality a man-of-war or privateer arming herself here, then it will become your duty, either to concert measures for bringing the Oreto down into this part of the harbor, or, what will be a safer course, to remove your own ship to Cochrane's Anchorage and there watch her proceedings from day to day."[3]

On the day of the date of this letter (June 2) the cargo of the Bahama, consigned to Adderly & Co., was "warehoused" and stored at Nassau in the public warehouses.[4] About this time, Adderly & Co. made application to the Receiver General for leave to ship a load of arms and other merchandise by the steamer Oreto.[5]

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[1] Brit. App., vol. i, p. 17.
[2] Ibid.
[3] Brit. App., vol. i, p. 18.
[4] Am. App., vol. vi, pp. 325, 326.
[5] Testimony of Harris, Brit. App., Counter Case, vol. v, p. 40.

On the 4th of June this application was considered by the Executive Council, (Mr. Harris being a member,) and with their advice it was ordered by the Governor that if practicable the Oreto should take in her cargo within the port of Nassau.[1]

In accordance with the advice of the Council, the Governor appears to have communicated this order to Commander McKillop, and he, under date of the 6th, reports: "I have visited the screw steamer Oreto and examined her. She is fitted in every way for war purposes, magazines, shell-rooms, and other fittings totally at variance with the character of a merchant-vessel. She has no guns or ammunition on board. The Captain does not deny that she is intended for a war-vessel."[2] This report was referred to the Attorney General, and he on the 7th gave his opinion as follows: "There are no facts set forth in the within letter which would in my opinion authorize the seizure of the Oreto. They constitute only circumstances of suspicion, which if coupled with some actual overt act would doubtless materially strengthen the case against the vessel, but which do not in themselves form a ground of seizure."[3]

On the 13th of June the letter of Commander Hickley and the report of himself and his officers, a statement of the contents of which has been already given, was submitted to the Attorney General, and in regard to them he says: "I am of the opinion that there is nothing contained in those documents which would justify the detention of the vessel."[4]

On the 15th of June, Commander Hickley, as has been seen, addressed another letter to the Governor, in which, in addition to what has been before stated, occurs this passage:

> On my former communication to your Excellency of the 13th of June, I have the Crown Lawyers' opinion, and I again bring the facts of the broadly suspicious character of the Oreto before you, with the addition of those of her old crew having left her, and for why, as likewise her entering or attempting to enter a new crew, for your consideration and the Law Officers of the Crown; and failing their sanction to take charge of the Oreto, (and it is improbable, if not impossible, that they can know a war vessel's equipment as well as myself and officers,) I have to suggest that I should forthwith send her to the Commodore or Commander in Chief on my own professional responsibility; as allowing such a vessel as the Oreto to pass to sea as a British merchant vessel and a peaceful trader would compromise my convictions so entirely as to be a neglect of duty as Senior Naval officer here present, and certainly not doing my duty in co-operating with your Excellency for the protection of the harbor of Nassau.[5]

This being submitted to the Attorney General, he replied, that it did not appear to him "to carry the case against the Oreto further than shown in the previous reports of himself and Commander McKillop, and I contend that no case has as yet been made out for the seizure of that vessel under the Foreign Enlistment Act. With respect to the suggestion in the concluding part of Commander Hickley's letter, I have to remark that, if the vessel is liable to seizure at all, it must be under the provisions of the Foreign Enlistment Act, and if so seized the question of her liability may as readily and efficiently be decided in the Court of Vice Admiralty of this Colony as before any Tribunal in Her Majesty's Colonial Possessions, and consequently that no necessity exists, nor do I think that any excuse can be made, for sending her, as suggested by Commander Hickley, to the Commodore or Commander in-Chief, who I presume are either at Bermuda or Halifax; while, on the other hand, if I am correct in the view I have taken of her non-liability to seizure, the reasons against sending her hence will of course be far

[1] See proceedings of the meeting, which are stated in full on page 62 of the British Case.

[2] Brit. App., vol. i, p. 20.

[3] Ibid.

[4] Brit. App., vol. i, p. 23.

[5] Ibid., p. 24.

more powerful; and therefore, on either view of the case, I advise His Excellency to withhold his sanction from the course of action suggested."[1]

On the receipt of a copy of this opinion, Commander Hickley abandoned his seizure of the vessel, since it was not sanctioned by the Law Officers of the Crown at Nassau, and as he was told by His Excellency that he did not "think it consistent with law or public policy that she should now be seized on the hypothesis that she is clearing out for the purpose of arming herself as a vessel of war beyond the limits of the harbor. We have done our duty in seeing that she does not leave the harbor equipped and prepared to act offensively against one of two belligerent nations, with each of whom Great Britain is at peace."[2]

On the 17th, however, notwithstanding the strong opinion of the Law Officer of the Crown who discharged the duties of Queen's Advocate and Attorney General of the Colony, the Governor yielded to the conviction of Commander Hickley and his officers that she was a vessel of war that could be equipped in "twenty-four hours for battle," and consented to her seizure, as the "equipment of the Oreto, the object of her voyage hither, the intent of her voyage hence, the nature of her crew, and the purpose of their enlistment, are all the fair subjects of judicial investigation."[3] In accordance with this view of the case she was seized and the Governor gave "the necessary instructions to proceed."[4]

Under these instructions the Attorney General proceeded against her on the theory of his opinions, so often reiterated, that she could only be held for acts of equipment and fitting out actually occurring within the jurisdiction of the port of Nassau.

The vessel had arrived at Nassau on the 28th of April, six weeks before her final seizure. From the first she was an object of suspicion and comment. Commander McKillop reported her arrival and his suspicions to the Admiralty in London, under date of the 30th of April. His report was received in London, so that it was communicated to the Foreign Office, on the 10th of June.[5] Not a word went from any other officer at the Colony to the Home Government until the 21st of June, when Governor Bayley reported the seizure and all that preceded it, including the opinions of the Attorney General. This was communicated to the Foreign Office at London, on the 31st of July.[6]

Seizure of the Florida.

It was submitted to the Law Officers of the Crown, and they on the 12th of August reported: "We think that the facts warranted the seizure, but we must add that it is very important that, on the trial, evidence should be adduced of what occurred at Liverpool, as regards the building and fitting out and the alleged ownership and destination of the Oreto."[7]

The Law Officers of the Colony had no communication whatever with the Law Officers of the Home Government. But on the 28th of June, Heyliger, the Confederate agent at Nassau, advised the insurgent Secretary of War that "the proceedings instituted for her release are now complete, and will be pushed forward vigorously. Our complaint was filed in Court this morning, and the libel may be put in to-day or on the 30th. On the 1st July our Counsel will argue on the law points."[8]

And so it was in fact. The seizure was made on the 17th, supported

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[1] Brit. App., vol. i, p. 25.
[2] Ibid.
[3] Brit. App., vol. i, p. 27.
[4] Ibid.
[5] Ibid., p. 11.
[6] Layard to Rogers, Brit. App., vol. i, p. 29.
[7] Brit. App., vol. i, p. 31.
[8] Am. App., vol. vi, p. 88.

by the affidavit of Commander Hickley on the 20th; an affidavit of claim was filed by Captain Duguid on the 27th; the libel was filed by the Attorney General on the 1st of July; the responsive plea of the claimant on the 21st;[1] the trial commenced on the 10th—at least the first witness was examined then; the last witness was examined on the 26th; the argument was made on the 30th, and the decree rendered on the 2d of August.[2]

It will be interesting to see what was being done by the agents of the insurgents while these proceedings were going on. Maffitt, who had been assigned by Commander Bullock to the command of the Florida, (then called the Manassas,) arrived in Nassau on the 6th of May,[3] and on the 22d he reported to the insurgent Secretary of the Navy that he had arrived at Nassau, and had personally assumed command "of the Manassas, which vessel I hope to have ready for service soon."[4]

On the 26th of May the insurgent Secretary of the Navy made a requisition upon the Treasury for $50,000, to be sent "to fit out and equip the Confederate States steamer Manassas, now at Nassau,"[5] and on the next day (the 27th) a bill was ordered drawn for that amount, "in favor of Lieutenant John N. Maffitt, Confederate States Navy."[6]

Heyliger was superintending the affairs of the insurgents at Nassau, and shipping regularly his cargoes of articles contraband of war.[7]

Nassau was visited by numerous parties, almost all of whom were more or less interested in what was then considered the rising fortunes of a new nation. Many of them were persons of education and acquirements, which gave them ready access to the best society of the place, while unfortunately, on the other hand, we had but few Northern visitors.[8]

The island of New Providence, of which Nassau is the only town, is a barren limestone rock, producing only some coarse grass, a few stunted trees, a few pineapples and oranges, and a great many sand-crabs and fiddlers. Before the war it was the rendezvous of a few wreckers and fishermen. Commerce it had none, except such as might grow out of the sponge trade and the shipment of green turtle and conch shells. The American war, which has brought woe and wretchedness to so many of our States, was the wind which blew prosperity to Nassau. It had already put on the air of a commercial city, its fine harbor being thronged with shipping, and its warehouses, wharves, and quays filled to repletion with merchandise. All was life, bustle, and activity. Ships were constantly arriving and depositing their cargoes, and light-draught steamers, Confederate and English, were as constantly reloading these cargoes and running them into the ports of the Confederate States.[9]

The notorious sympathies of the Colony and the supposed sympathies of England with the Southern Confederacy have, I doubt not, led the Consul, and may lead the Government of the United States, to imagine that the Oreto has all along received a collusive and dishonest support from the authorities of the place. Nothing could be further removed from the truth than this belief; still it would be exceedingly awkward were the reasonableness of these suspicions to be tested by the experience of any vessel which arrived equipped, to act on the Federal side, and expecting to find her arms and ammunition here.[10]

They are all southern sympathizers. * * * Indeed, this seems to be our principal port of entry, and the amount of money we throw into the hands of the Nassauites probably influences their sentiments in our favor.[11]

On the 8th of June Captain Semmes arrived at the island and took rooms at the hotel. Heyliger and Lafitte, agents of the Insurgent States at Nassau, gave him a dinner, at which about forty persons were pres-

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[1] Brit. App., vol. i, pp. 61, 63, 67, and 68.
[2] Brit. App., vol. i, p. 38; vol. v, p. 37.
[3] Am. App., vol. vi, p. 317.
[4] Ibid., p. 236.
[5] Ibid.
[6] Ibid., p. 237.
[7] Letters Heyliger to Randolph, ibid., pp. 76–87.
[8] Attorney-General Anderson's vindication of himself, February 10, 1872. Brit. App., Counter Case, vol. v, p. 25.
[9] Captain Semmes's description of Nassau in his "Adventures Afloat," Am. App., vol. vi, p. 487.
[10] Governor Bailey to the Duke of Newcastle, June 21, 1862, Brit. App., vol. i, p. 14.
[11] Journal found on board the Florida, Am. App., vol. vi, p. 335.

ent. The same gentlemen also gave a dinner to Captain Maffitt while he was there, which was attended by the same number of persons.[1]

During the existence of the blockade of the Southern ports of America, vessels leaving the port of Nassau, with the intention of endeavoring to run their cargoes into the blockaded ports, almost invariably cleared for St. John's, New Brunswick, and many of them took in their outward cargoes at the anchorages adjacent to the harbor of Nassau.[2] Adderly & Co., the most influential mercantile establishment in Nassau,[3] were receiving their two and one-half per cent. commission for transshipment; a most exorbitant demand, but one in unison with the usages of the place, and submitted to in consideration of retaining their interest.[4]

It is known that this trade of blockade-running has been a most profitable trade; that great fortunes have been made by many persons in carrying it on, and that Nassau and some other places have swarmed with vessels which have never previously been seen in those ports.[5]

In the midst of such surroundings, and with such a prosecutor, the case of the Oreto was tried, and resulted in a decree against Her Majesty; and the United States now repeat what they said in their Case: "If it had been predetermined that the Oreto should be released, the steps could not have been better directed for that purpose." Adderly & Co. were at the outset informed what they must refrain from doing to avoid a conviction under the law as the Attorney General construed it, and they followed this advice, as it would seem, faithfully. The Attorney General commenced and prosecuted the case upon his construction of the law, which Her Majesty's Government admits was erroneous. He made no claim before the judge for a different construction, and the judge proceeded with that point admitted against the Government. The United States believe, as did His Excellency, Governor Bayley, that it would have been found to be exceedingly awkward to Her Majesty's Government if the reasonableness of their suspicions had been tested at that time by the experience of a United States vessel arriving at that port expecting to find its arms and ammunition there.

Trial and release. The criticisms on these proceedings in the American Case are sustained.

As soon as the release was ordered, that "energetic officer," Captain Maffitt, and his lieutenant, Stribling, "threw themselves" on board of the vessel.[6] On the evening of her release, solomon, a shipping-master at that port, at the request of Maffitt, commenced engaging men for her at his shipping-office. By Friday morning he had sent on board sixty-five men, but in the mean time the vessel had gone outside,[7] under a clearance in ballast for St. John's, New Brunswick, obtained at the Custom House.[8]

On the 6th of August Lafitte, an insurgent agent, purchased the schooner Prince Alfred in the name of A. J. Adderly, one of the firm of Adderly & Co.[9] On the 7th, Adderly & Co. loaded her from the public warehouse, with the cargo warehoused for them from the Bahama on the 2d of June, and with shot, shells, and stores warehoused at different times from other vessels. She was cleared outward on the same day for St. John's.[10]

The Oreto went outside and steamed up and down the coast trying her machinery. Her Majesty's ship of war, the Peterel, was at anchor outside the bar, and while there a boat from the Oreto, with "a man who stated he was the master in command of the

Armament of the Florida.

[1] Am. App., vol. vi, pp. 317, 487.
[2] Att.-Gen. Anderson, Sept. 1, 1871, Brit. App., vol. i, p. 53.
[3] Heyliger to Benjamin, Am. App., vol. vi, p. 66. [4] Ibid.
[5] Lord Russell in the House of Commons, February 16, 1864, Am. App., vol. v, p. 526.
[6] Am. App., vol. vi, p. 489. [7] Am. App., vol. vi, p. 311.
[8] Brit. App., vol. i, p. 58. [9] Kirkpatrick to Seward, Am. App., vol. vi, p. 327.
[10] Am. App., vol. vi, pp. 325, 328.

Oreto," came alongside; "said he was very short-handed, and wanted to anchor for about two hours to adjust his machinery, but if he anchored outside he had not sufficient crew to weigh his anchor, and begged I [the captain of the Peterel] would assist him by lending him men." The men were refused, but he was told "he might hold on astern of the Peterel," and a line was given him for that purpose.[1] The same night about one o'clock the Prince Alfred came out from Nassau while the Oreto was fastened astern of the Peterel. When she got outside of the bar, a light was struck on board; the Oreto let go the hawser of the Peterel, stood to the northward for a while, and then rounded to and took the Prince Alfred in tow.[2] The two vessels then proceeded, the Prince Alfred being in tow, to Green Cay, about sixty miles from Nassau, and there the guns, ammunition, and stores were transferred from the Prince Alfred to the Oreto, about a week being occupied in so doing.[3]

It is said on page 78 of the British Counter Case that Her Majesty's Government has no means either of verifying or disproving the truth of the statement in the Case of the United States as to the arming of the Florida. On page 67 of the British Case, however, it is said that Her Majesty's Government "has been informed and believes that she was subsequently armed for war by a Captain Maffitt; * * that she was then commissioned; * * and that after keeping the sea for a few days, she put in at the port of Cardenas, in Cuba, where (or at Havana) she remained for nearly a month. On the 4th September the vessel arrived at and entered the port of Mobile." The precise point at which she took on her armament is not important. It is sufficient for all the purposes of the United States that she was armed within a short time after she left Nassau. It appears from the admissions in the British Case, that she entered the port of Mobile within a month after leaving Nassau; that she remained at Cardenas or Havana about a month before she went to Mobile, and that she was armed and commissioned before she reached Cardenas. These admissions establish, therefore, the important fact of arming shortly after leaving Nassau. But the United States submit that the proof presented by them establishes the further fact that she was armed at Green Cay, in the manner and under the circumstances they have alleged. This proof will be found in vol. vi of the American Appendix, pages 306 to 321.

The Oreto, with her guns all mounted, at 8 a. m. of the 17th, parted from the Prince Alfred, hoisted the flag of the insurgents, and started upon her cruise under the name of the Florida.[4] She proceeded to Cardenas, a port under the jurisdiction of Her Majesty the Queen of Spain, and there attempted to ship a crew, but "the matter was brought to the notice of the Government," and an officer sent to the commander of the Florida "with a copy of the proclamation of the Queen of Spain and a notification to him that the Florida had become liable to seizure" The commander then "repudiated the transaction, and to avoid difficulty with the Government," paid the passage of twenty men to and from Havana, and returned the men to Havana. This was upon the 31st of August.[5]

At Cardenas.

She then sailed for Mobile and ran into the port through the blockade on the 4th of September "wearing the English red ensign and pennant,"[6] and painted like a British vessel of war. A

At Mobile.

[1] Letter of Watson to Admiralty, Brit. App., Counter Case, vol. v, p. 51.
[2] Affidavits of Solomon and Lee, Am. App., vol. vi, pp. 312, 321.
[3] Brit. Counter Case, p. 78; Am. App., vol. vi, p. 328.
[4] Am. App., vol. vi, pp. 308, 328.
[5] Ibid., voucher No. 6, p. 331.
[6] Brit. App., vol. i, p. 74.

commander in Her Majesty's Navy soon after the occurrence said, "had I met the Oreto at sea, armed and having a pennant, I should have taken her for one of our ships."[1]

She remained at Mobile until the 15th of January, and then ran the blockade outwards. Stopping at Havana on the way for forty-eight hours, she arrived again at Nassau early in the morning, about day-break, of the 25th.[2] She steamed in over the bar without a pilot and cast anchor without permission of the governor. On his attention being called to the proclamation which required permission before coming to anchor, Captain Maffitt "expressed his regret for having unwittingly violated the regulations of the port," and was taken on shore by the adjutant of the fort in the Government boat to make his explanations to the Governor.[3]

At Nassau, January 25, 1863; receives coals, supplies, and recruitments.

He called at the Government House between eight and nine o'clock, and not seeing the Governor, addressed him a note as follows: "As this vessel is in distress for want of coal, I very respectfully request permission to anchor in the harbor for the purpose of obtaining the same."[4] Permission was given and she "took on board coal and provisions to last us for several months."[5] Her bunkers were filled with coal, and some placed on deck and in every place that could hold it. The coal was taken from wharves and vessels lying in the harbor. The money for coaling her was paid from Mr. Henry Adderly's store.[6] She remained in the harbor until afternoon of the 27th, and at sunset was outside of the bar, opposite the entrance of the harbor, "within a mile of the light-house, running up and down under slow steam, with just steerage-way on her, apparently waiting for something."[7] Eleven men were obtained there and shipped. Adderly & Co. paid the account for shipping the men, which was signed by Captain Maffitt.[8]

She arrived at Barbados, also within the jurisdiction of Her Majesty's Government, on the 24th of February, and applied, in consequence of her having met with severe weather, to be allowed to ship some coal and some lumber for repairs." Her commander assured the Governor "he was bound for distant waters."[9]

At Barbados February 24, 1863: received coals and repairs.

Under these circumstances she was permitted to take in ninety tons of coal. On going into Barbados the bark Sarah A. Nickels ran in before to avoid capture. The Consul of the United States, after the arrival of the Florida, requested that she might be detained until 5 p. m. of the 25th, in order to give the bark her start of twenty-four hours. This was granted.[10]

On the 8th of May she arrived at Pernambuco. A representation was made that her machinery was out of order, and that it would not be possible to proceed with safety in less than three or four days. Permission to remain and repair was granted, and she sailed at 2 p. m. of the 12th.[11]

At Pernambuco

From there she went to Bermuda, where she arrived on the 15th of July, and where salutes were exchanged with the fort. "This is the first salute which the flag of the Confederate States has ever received in a foreign port, and consequently we dwellers in the little island of Bermuda think very proudly of it.'"[12]

At Bermuda, June 15, 1863: repairs and coals.

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[1] Am. App., vol. vi, p. 332.
[2] Brit. App., vol. i, p. 79.
[3] Ibid., p. 80.
[4] Brit. App., vol. i, p. 77.
[5] Private Journal, Am. App., vol. vi, p. 335.
[6] Affidavit of Demerith, ibid., p. 336.
[7] Affidavit of Jackson, ibid.
[8] Affidavit of Solomon, ibid., p. 312.
[9] Brit. App., vol. i, p. 91.
[10] Ibid., p. 95.
[11] Brit. Case, p. 69; App., vol i, p. 106.
[12] Walker to Huse, Am. App., vol. vii, p. 57.

Captain Maffitt "stated that he had been at sea seventy days, with the exception of two visits to Havana and Barbados, each of which occupied less than twenty-four hours, and a visit of shorter duration to a port in the Brazils; that he was last from the immediate neighborhood of New York, within sixty miles of which he had been harassing the United States commerce; that he was in want of repairs to the hull and machinery of his ship, and a small supply of coal."[1]

Applications were made for leave to purchase coal from and repair at the Government dock-yard, which were refused. She was permitted, however, to remain in port until the 25th, when her repairs were completed,[2] and she took in "a full supply of best Cardiff coal brought here from Halifax by steamer Harriet Pinkney."[3] This vessel was one of the insurgent "transports."[4] The conduct of the Governor was approved by the Government September 16.[5]

At Brest; receives recruits and new machinery from Liverpool.

The Florida arrived at Brest, France, on the 23d of August, "in order that her engines and copper sheathing might be repaired."[6] She remained until the 9th of February, 1864.[7] Captain Maffitt, on the 3d of September, sent to Captain Bullock, "Confederate States Navy, Liverpool," a list of men discharged from her with their accounts and discharges. Many of them asked for "transportation, and others for reference to you [Bullock] or to a Confederate agent."[8] These men went to Liverpool, and were paid off in October, 1863.[9]

At Brest, Captain Maffitt left the ship and Captain Barney took command. On the 22d of September, Frazer, Trenholm & Co. and J. R. Armstrong wrote from Liverpool to the new Captain as follows:

> We beg to acknowledge the receipt of your favor of the 18th instant, the contents of which we have noted, and will have our best attention. We are informed by Messrs. Fawcett, Preston & Co., the builders of the engines of the Florida, that the spare machinery to which you refer was sent to Havre some time ago, and is now lying there subject to an order for delivery, which they have given to Captain Bullock. We are also informed by the same parties that they sent a blower, but they believe it is not the sort required, and they are now endeavoring to procure a more suitable one. As regards the engineers, we must await Captain Bullock's return to know who the men are. We have requested Messrs. Fawcett, Preston & Co. to engage two or three good, steady firemen; and as soon as Captain Bullock arrives (on the 24th) we will endeavor to have engineers, firemen, and machinery sent to you, and by the route you suggest."[10]

The same parties were in frequent correspondence with the paymaster of the vessel at Brest in respect to her finances.[11] A full crew was sent to her from London and Liverpool in January, and "two steel Blakely rifled-guns with steel-pointed elongated shot to fit them."[12] She sailed from Brest under the command of Captain Morris.

At Martinique.

On the 26th of April she was at Martinique for coal and provisions. On the 13th of May she stopped at Bermuda to land a sick officer and to obtain news.[13] On the 18th of June she appeared at that port again, when she asked permission to take in coal and effect some repairs.[14] Permission was given her to remain five days after the 21st. She quitted the harbor on the 27th, but remained cruising about the island until the 5th of July, when she was seen from the land.[15]

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[1] Gov. Ord. to Duke of Newcastle, Brit. App., vol. i, p. 108.
[2] Brit. Case, p. 69; App., vol. i, p. 111.
[3] Am. App., vol. vi, p. 347; Brit. Case, p. 70; App., vol. i, p. 108.
[4] Am. App., vol. i, p. 732.
[5] Brit. App., vol. i, p. 111.
[6] Brit. Case, p. 70.
[7] Ibid., p. 72.
[8] Am. App., vol. vi, p. 349.
[9] Brit. App., vol. i, pp. 118, 122.
[10] Am. App., vol. vi, p. 352.
[11] Ibid., p. 354.
[12] Ibid., p. 353.
[13] Brit. App., vol. i, p. 132.
[14] Ibid.
[15] Ibid., p. 133; Am. App., vol. vi, p. 356.

While there, on the 27th of June, 135 tons of coal were paid for by G. P. Black, who was temporarily acting as the agent for the "Confederate States."[1]

A draft for £8,500 sterling on Captain Bullock was discounted by this same agent, and money to the amount of more than £600 expended for repairs and supplies.[2]

From Bermuda she went to Bahia where she ended her cruise in the month of October. At Bahia.

It will thus be seen, that the first port which was visited by the Florida after her escape from Nassau was under the jurisdiction of the government of Spain. At this port she escaped seizure for a violation of the sovereignty by "repudiating" the act.

After leaving Mobile she touched at Havana, but does not appear to have taken in coal or supplies. Then she went to Nassau, then to Barbados, then to Pernambuco, then to Bermuda, then to Brest, within reach of her base of supplies at Liverpool; then to Martinique, then to Bermuda, and then to Bahia. After leaving Mobile, she visited once the ports of Spain, twice those of France, twice those of Brazil, and four times those of Great Britain.

During her cruise she commissioned at different times three tenders, the Clarence, the Tacony, and the Archer. For their acts she is liable as for her own. She was the principal, and their acts were her acts. Her tenders

[1] Am. App., vol. vi, p. 359; Acting Governor Monroe to Mr. Cardwell, British App., vol. i, p. 133.

[2] Am. App., vol. vi, p. 358, *et seq.*

VII.---THE ALABAMA.

As to this vessel, Her Majesty's Government admits, "that at the time when she sailed from England in July, 1862, she was, as regards the general character of her construction, specially adapted for warlike use; that the adaptation had been effected within British jurisdiction;"[1] and that "the general construction of the vessel was such as to make it apparent that she was intended for war and not for commerce."[2]

The Alabama. Her adaptation to war is not disputed.

The drawings found among the archives of the insurgents signed by the Messrs. Laird, as early as the 9th October, 1861, copies of which are part of the documents and evidence filed by the United States with their Counter Case, show conclusively that she never was intended for anything else than a vessel of war.

It is also admitted in the British Counter Case that "the question for the arbitrators is, whether the British Government had, according to the fair and just sense of those words, reasonable grounds to believe that she was intended to carry on war against the United States; and having it, failed to use such diligence as any international obligation required to prevent her departure from Great Britain, or to prevent her equipment within its jurisdiction."[3]

The question to be decided.

The United States will now proceed to consider the facts necessary to a decision of that question, and for that purpose will use almost exclusively the evidence presented to the Tribunal by Her Majesty's Government.

As has been seen, the Florida sailed from Liverpool, without any attempt at her detention by the Government, on the 22d of March, 1862. The attention of Earl Russell had been called to her by Mr. Adams more than a month previous to her departure, and in so doing he declared that his opinion as to her destination for war against the United States was based upon the "evidence furnished in the names of the persons stated to be concerned in her construction and outfit." These persons named were Fawcett, Preston & Co., and Frazer, Trenholm & Co. As late as the 9th of May, the Foreign Office appears to have been in correspondence with the officers of the Treasury in respect to her escape.[4] She arrived at Nassau on the 28th of April, and her arrival at that port became known in Liverpool and was announced in the Liverpool Journal of Commerce on the 27th of May.[5] It must have been apparent, at that time, to the officers of the customs at Liverpool, that she had not been intended for the Italian Government, but for the insurgents, and that any pretense of Italian destination was false.

Under these circumstances, on the 23d of June, Mr. Adams, in a note to Earl Russell, said:

Some time since, it may be recollected by your Lordship, that I felt it my duty to

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[1] Brit. Counter Case, p. 80.
[2] Brit. Case, p. 118.
[3] Brit. Counter Case, p. 80.
[4] Brit. App., vol. i, p. 9.
[5] Dudley to Seward, Am. App., vol. vi, p. 23[illegible].

make a representation touching the equipment from the port of Liverpool of the gunboat Oreto, with the intent to make war upon the United States. Notwithstanding the statements returned from the authorities of that place, with which your Lordship favored me in reply, touching a different destination of that vessel, I have the strongest reason for believing that that vessel went directly to Nassau, and that she had been there engaged in completing her armament, provisioning, and crew for the object first indicated by me.

Mr. Adams gives information of, June 23, 1862.

I am now under the painful necessity of apprising your Lordship, that a new and still more powerful war-steamer is nearly ready for departure from the port of Liverpool on the same errand. This vessel has been built and launched from the dock-yard of persons, one of whom is now sitting as a member of the House of Commons, and is fitting out for the especial and manifest object of carrying on hostilities by sea. * * * The parties engaged in the enterprise are persons well known at Liverpool to be agents and officers of the insurgents in the United States, the nature and extent of whose labors are well explained in the copy of an intercepted letter of one of them, which I received from my Government some days ago, and which I had the honor to place in our Lordship's hands on Thursday last. I now ask permission to transmit, for your consideration, a letter addressed to me by the Consul of the United States at Liverpool in confirmation of the statements here submitted, and to solicit such action as may tend either to stop the projected expedition or to establish the fact that its purpose is not inimical to the people of the United States.[1]

The intercepted letter referred to was from Caleb Huse, "Captain of Artillery," to Major J. Gorgas, "Confederate States Artillery, War Department." It is said in the Case presented by Her Majesty's Government,[2] that the copy of the intercepted letter referred to "was a paper purporting to be a copy of a letter or report from a Confederate officer of artillery, addressed to some person unknown," and what purports to be a copy of the letter itself is printed in British Appendix, vol. i, p. 178, without the name of the party to whom it was addressed. The same letter is printed by the United States in their Appendix, vol. i, p. 538, where the name of the person to whom it was addressed appears. It was transmitted by Mr. Seward to Mr. Adams with a dispatch under date of June 2, in which he says:[3]

There has just now fallen into our hands a very extraordinary document, being a report made by Caleb Huse, who calls himself a captain of artillery, and who is an agent of the insurgents in Europe, to the chief of the artillery of the War Department of the insurgents.

The letter was "placed in the hands" of Earl Russell by Mr. Adams on the Thursday which preceded the 23d of June,[4] and inasmuch as the dispatch of Mr. Seward transmitting it stated in terms to whom it was addressed, there can scarcely be a doubt that if the copy omitted his name, the proper explanation was made by Mr. Adams at the time. So that it is hardly to be supposed that the party addressed was unknown to Earl Russell at the time he received Mr. Adams's letter of the 23d of June, although it may have been to the persons who prepared the British Case.

The letter is found in the British Appendix, vol. i, p. 178. It bears date April 1, 1862, at Liverpool, a few days after the sailing of the Oreto, and does, as is stated in the British Case,[5] relate "to purchases of military supplies for the Confederate army and to vessels employed in blockade-running." It also states that "Messrs. Frazer, Trenholm & Co., of this city, placed at my disposal a fine ship, the Bahama, which I supposed would take all the batteries." This is the same vessel which, as has been seen, took out the armament of the Oreto, and which afterward took out that of the Alabama.

In the letter of the consul of the United States at Liverpool, trans-

[1] British Case, p. 81.
[2] Page 81.
[3] Am. App., vol. i, p. 537.
[4] Brit. Case, p. 81.
[5] Page 81.

mitted by Mr. Adams to Earl Russell, on the 23d, it was said: "The evidence I have is entirely conclusive to my mind. I do not think there is the least room for doubt about it. * * * The strictest watch is kept over this vessel; no person except those immediately engaged upon her is admitted into the yard. On the occasion of the trial-trip, made last Thursday week, no one was admitted without a pass, and these passes were issued to but few persons, and those who are known here as active secessionists engaged in sending aid and relief to the rebels." He also stated that "the foreman in Messrs. Laird's yard says she is the sister to the gun-boat Oreto, and has been built for the same parties and for the same purpose; when pressed for a further explanation, he stated that she was to be a privateer for the Southern Government in the United States." And the Consul further stated that certain officers from the Sumter, whose names he gave, had said the vessel was being built for the Confederate States.[1]

Referred to law officers of the Crown.

This letter of Mr. Adams with that of the Consul, was referred by Earl Russell to the Law-Officers of the Crown and to the Lords Commissioners of the Treasury, on the 25th of June, of which Mr. Adams was duly advised.[2]

Their action upon it.

On the 30th June the Law-Officers reported to Earl Russell that "the report of the United States Consul at Liverpool, * * * besides suggesting other grounds of reasonable suspicion, contains direct assertion that the foreman of Messrs. Laird, the builders, has stated that this vessel is intended as a privateer for the service of the government of the Southern States; and, if the character of the vessel and of her equipment be such as the same report describes them to be, it seems evident that she must be intended for some warlike purpose. Under these circumstances, we think that proper steps ought to be taken, under the direction of Her Majesty's Government, by the authorities of the customs at Liverpool, to ascertain the truth, and that, if sufficient evidence can be obtained to justify proceedings under the foreign-enlistment act, such proceedings should be taken as early as possible. In the mean time, Mr. Adams ought, we think, to be informed that Her Majesty's Government are proceeding to investigate the case; but that the course which they may eventually take must necessarily depend upon the nature and sufficiency of any evidence of a breach of the law which they may be enabled to obtain; and that it will be desirable that any evidence in the possession of the United States Consul at Liverpool should be at once communicated to the officers of Her Majesty's customs at that port."[3]

The Lords Commissioners of the Treasury sent the letter of Mr. Adams, with that of the Consul, to the Commissioners of Customs on the 25th of June.[4] These letters were forwarded by the Commissioners to the Collector of Liverpool previous to the 28th.[5] But before that time, on the 20th, and before the letter of the Consul to Mr. Adams, or that of Mr. Adams to Earl Russell, the Collector's attention had been called to the same vessel by the Consul in a letter to him,[6] in which was detailed, with more particularity than in the letter to Mr. Adams, his knowledge of facts and his grounds of suspicion. This letter the Collector must have had when he received the communication from the Commissioners.

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[1] Brit. Case, p. 81.
[2] Ibid., p. 82.
[3] Brit. Case, p. 83.
[4] Letter from Mr. Arbuthnot to Mr. Hammond, July 2, Brit. App., vol. i, p. 181.
[5] Brit. App., vol. i, p. 183.
[6] Am. App., vol. vii, p. 73.

On the 28th of June the customs surveyor at the port of Liverpool reported to the Collector "that the vessel to which these papers refer has not escaped the notice of the customs officers, but, as yet, nothing has transpired concerning her which appeared to demand a special report. The officers have at all times free access to the building-yards of the Messrs. Laird, at Birkenhead, where the said vessel is now lying, and there has been no attempt on the part of her builders to disguise, what is most apparent to all, that she is intended for a ship of war. Agreeably with your directions, I have personally inspected her and find that she is rightly described in the communication of the United States Consul, except that her engines are not on the oscillating principle. * * * The current report of that vessel is that she has been built for a foreign government, and that is not denied by the Messrs. Laird, with whom I have communicated on the subject; but they do not appear disposed to reply to any question with reference to the destination of the vessel after she leaves this port, and we have no other reliable source of information. It will be in your recollection that the current report of the gun-boat Oreto was, that she had been built for a foreign government, which vessel recently left this port under a British flag, without any guns or ammunition on board, as previously reported."[1] Proceedings of customs authorities.

This report was transmitted by the collector to the commissioners of customs on the same day (the 28th) and by them referred to the solicitor of customs, who, on the 30th, (the same day that the Law-Officers made their communication to Earl Russell, as just stated,) gave his opinion that "the officers at Liverpool have acted discreetly in keeping watch upon her, and should continue to do so, immediately reporting to the board any circumstances that they may consider to call for directions, or advisable to bring under the board's notice; but the officers ought not to move in the matter without the clearest evidence of a distinct violation of the foreign-enlistment act, nor unless at a moment of great emergency, the terms of the act being extremely technical and the requirements as to intent being very rigid. It may be that the ship, having regard to her cargo as contraband of war, might be unquestionably liable to capture and condemnation, yet not liable to detention under the foreign-enlistment act, and the seizers might entail upon themselves very serious consequences."[2]

On the 1st of July the commissioners of customs transmitted their own report to the Lords Commissioners of the Treasury, in which they embodied the substance of the report of the surveyor to the collector, including his statement that the builders did not appear disposed to reply to any questions respecting the destination of the vessel after she left Liverpool, and added that "having referred the matter to our solicitor, he has reported his opinion that, at present, there is not sufficient ground to warrant the detention of the vessel, or any interference on the part of this department, in which report we beg leave to express our concurrence. And, with reference to the statement of the United States Consul, that the evidence he has in regard to this vessel being intended for the so-called Confederate Government in the Southern States, is entirely conclusive to his mind, we would observe that, inasmuch as the officers of customs of Liverpool would not be justified in taking any steps against the vessel, unless sufficient evidence to warrant her detention should be laid before them, the proper course would be for the consul to submit such evidence as he possesses to the collector at that port,

[1] Brit. App., vol. i, p. 183.

[2] Ibid.

who would thereupon take such measures as the provisions of the foreign-enlistment act would require. Without the production of full and sufficient evidence to justify their proceedings, the seizing officers might entail on themselves and on the Government very serious consequences. We beg to add that the officers at Liverpool will keep a strict watch on the vessel, and that any further information that may be obtained concerning her will be forthwith reported."[1]

This report of the commissioners of customs was transmitted by the Lords Commissioners of the Treasury to the Foreign Office, and received there on the 2d of July.[2]

Thus it will be seen that twenty-seven days before the departure of the vessel, Her Majesty's Government was informed by its own officers that the "character of the vessel and of her equipment" was such as the report of the consul described them to be, and that, therefore, in the opinion of the Law-Officers of the Crown, "she must be intended for some warlike purpose." And the Government was also, at the same time and in the same manner, informed that in the face of what had been acknowledged by the Law-Officers of the Crown to be "grounds of reasonable suspicion" of the Consul, the builders of the vessel, (a firm, one of the ostensible members of which, at the time of the original contract for her building, was a member of the House of Commons,)[3] on being inquired of by one of the officers of the Government, *did not appear to be disposed to reply to any question with reference to the destination of the vessel after she left Liverpool.*

At the same time, too, one at least of the departments of the Government was reminded by one of its officers that the Oreto, referred to in the letter of Mr. Adams, had recently left the port, built for a foreign government, but "under a British flag, without any guns or ammunition on board." But the Arbitrators will look in vain for any evidence whatever tending to prove that any officer of the Government, of any grade, ever propounded to the builders, or any other person, a direct question as to the destination of the vessel, insisting upon an answer or a refusal to answer. This, too, when, under the opinion of the Law-Officers, the only material fact remaining to be ascertained was, by whom the vessel was to be employed.

Mr. Adams informed that the American consul may submit evidence to collector at Liverpool.

A copy of the report of the commissioners of customs was sent by Earl Russell to Mr. Adams, accompanied by a note which bears date the 4th of July, but which does not appear to have been received until the 7th, when it was acknowledged. In this note Earl Russell says: "I would beg leave to suggest that you should instruct the United States Consul at Liverpool to submit to the collector of customs at that port such evidence as he may possess tending to show that his suspicions as to the destination of the vessel in question are well founded."[4]

This was the first request ever made of Mr. Adams or any other officer of the Government of the United States, to assist the Government of Her Majesty in procuring testimony against any vessel as to which complaint had been made. As has been seen, Mr. Adams offered the assistance of the United States in respect to the Florida, but his offer was not accepted. Down to this time, therefore, no complaint should be made against the United States because they failed to accompany their representations with proof. But the United States believe

[1] Brit. Case, p. 83.
[2] Brit. App., vol. i, p. 181.
[3] Brit. App., Counter Case, vol. v, p. 204.
[4] Brit. Case, p. 84.

that, in view of facts already stated, the Arbitrators will feel as did the Consul when he received notice from Mr. Adams of what was required, and addressed the Secretary of State of his Government in the following language:

I do not think the British Government are treating us properly in this matter. They are not dealing with us as one friendly nation ought to deal with another. When I, as the agent of my Government, tell them from evidence submitted to me that I have no doubt about her character, they ought to accept this until the parties who are building her, and who have it in their power to show if her destination and purpose are legitimate and honest, do so. It is a very easy matter for the Messrs. Laird & Co. to show for whom they are building her, and to give such information as to her purpose as to be satisfactory to all parties. The burden of proof ought not to be thrown upon us. In a hostile community like this it is very difficult to get information at any time upon these matters. And if names are to be given it would render it almost impossible. The Government ought to investigate it and not call upon us for proof.[1]

And they will not be surprised that two days after, the Consul wrote Mr. Adams as follows:

When the United States Government, through its acknowledged representatives, say to the British Government that it is satisfied that a particular vessel, which is being built at a certain place in the kingdom by certain parties who are their own subjects, is intended as a privateer for the rebel government, it is the duty of that government to call up the parties who are fitting out the vessel, tell them what the charge is, and require them to state for whom and what purpose she is being built, and if the charge is admitted or shown to be true, to stop her sailing. Our Government has a right, it seems to me, not only to expect but to require this much of another friendly government. And if there was any disposition to do right and act honestly, this much at least would be accorded.[2]

On the 7th of July, and at once upon the receipt of the letter of Earl Russell, Mr. Adams wrote the vice-consul at Liverpool, in the absence of the Consul, transmitting a copy of the letter of his lordship, and in accordance with the suggestion therein, said:

The consul directed to furnish information to the collector.

"I pray you to furnish to the collector of customs, so soon as may be, any evidence which you can readily command in aid of the object designated."[3]

On the 9th of July the consul, having returned to Liverpool, addressed a letter to the collector at that port, in which he detailed with great particularity the circumstances which had come to his knowledge tending to show that the vessel was intended for the use of the insurgents. This letter is printed in full in the Britsh Case,[4] and is explicit in its statements. It certainly made a case which was worthy the attention of the Government. The Consul does indeed say that he cannot, in all cases, state the names of his informants, "as the information in most cases is given to me by persons out of friendly feeling to the United States, and in strict confidence;" but he adds: "What I have stated is of such a character that little inquiry will confirm its truth;" and the names of many persons, all of whom were within reach of the officers, were given to whom inquiries might have been addressed.

He does so.

He then says, the Messrs. Laird "say she is for the Spanish Government. This they stated on the 3d of April last, when General Burgoyne visited their yard, and was shown over it and the various vessels being built there, by Messrs. John Laird, jr., and Henry H. Laird, as was fully reported in the papers at the time." On this point the Consul says he caused inquiries to be made of the Spanish minister as to the truth of the statement, and the reply was a positive "assurance that

[1] Am. App., vol. vi, p. 382.
[2] Am. App., vol. vi, p. 386.
[3] Brit. App., vol. i, p. 242.
[4] Page 84.

she was not for the Spanish Government." If the statements in the letter of the Consul to Mr. Adams on the 21st of June contained, as the Law-Officers of the Crown said, "grounds of reasonable suspicion," this letter certainly ought to have put the officers of the Government upon inquiry as to the truth of the statements made; but the arbitrators will fail to discover in all the evidence submitted by Her Majesty's Government any proof tending to show any attempt at that, or any other time before the departure of the vessel, by any officer of Her Majesty's Government, to inquire as to the truth of any fact stated by the Consul.

The only statements made by him which have not been fully substantiated by subsequent developments are that Captain Bullock was to command the vessel and that the Florida was then arming at Nassau. In point of fact, it was true, however, that Captain Bullock had been, originally, assigned to the command of the Florida, and it was only about the 15th of June that a change was made.[1] As to the arming of the Florida at Nassau, it has already been seen why that had not then been accomplished as it afterward was. This last-named error in the statement of the Consul has, however, been considered of sufficient importance by Her Majesty's Government to be made the subject of special mention on page 85 of its Case.

Conduct of the collector.

On the 10th of July the collector acknowledged the receipt of the letter from the Consul, but accompanied his acknowledgment with the remark, "I am respectfully of the opinion, the statement made by you is not such as could be acted upon by the officers of this revenue, unless legally substantiated by evidence."[2] The collector, however, on the same day, (the 10th) ordered the vessel again to be "inspected" by the the surveyor, who immediately reported that it had been done, and that she was in the same state as regards her armament as on the date of his former report.[3] And the same day (the 10th also) the collector transmitted to the commissioners of customs the letter of the Consul and the report of the surveyor, accompanying them with a copy of his letter to the consul and the statement that "if she is for the confederate service the builders and parties interested are not likely to commit themselves by any act which would subject them to the penal provision of the foreign-enlistment act."[4]

On the 11th of July the solicitor of the customs, having considered the letter of the consul, reported:

> There is only one proper way of looking at this question. If the collector of customs were to detain the vessel in question, he would no doubt have to maintain the seizure by legal evidence in a court of law, and to pay damages and costs in case of failure. Upon carefully reading the statement, I find the greater part, if not all, is hearsay and inadmissible, and as to a part the witnesses are not forthcoming or even to be named. It is perfectly clear to my mind that there is nothing in it amounting to *prima facie* proof sufficient to justify a seizure, much less to support it in a court of law, and the consul could not expect the collector to take upon himself such a risk in opposition to rules and principles by which the Crown is governed in matters of this nature.[5]

On the 15th of July, four days after the opinion of the solicitor was given, and six days after the letter of the Consul, the commissioners of customs advised the collector that "there does not appear to be *prima-facie* proof sufficient in the statement of the Consul to justify the seizure of the vessel, and you are to apprise the Consul accordingly."[6]

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[1] Am. App., vol. vi, p. 488.
[2] Brit. Case, p. 85.
[3] Ibid., p. 86.
[4] Brit. App., vol. i, p. 184.
[5] Brit. Case, p. 86.
[6] Ibid.

It is almost incredible that it never occurred to any one of these several officers of the Government that there was anything in the letter of the Consul calling upon them for investigation of the facts submitted by him. And this, too, when, according to the opinion of the distinguished Law-Officers of the Crown given on the 30th of June, "the grounds of reasonable suspicion" suggested in the letter of the consul of the 21st were sufficient to make it proper that steps should be taken *to ascertain the truth of the statements* then made,[1] and when Mr. Adams, in his first communication upon this subject, had asked an inquiry by the officers of the Government as to the actual destination of the vessel.

On the 16th of July the collector informed the consul that the solicitor of customs had advised the commissioners of customs that "the details given by you in regard to the said vessel are not sufficient, in a legal point of view, to justify me in taking upon myself the responsibility of the detention of this ship."[2]

He declines to act.

On the same day (the 16th) a copy of the letter of the Consul of the 9th was submitted to Mr. Collier, afterward attorney-general and now one of the members of the judiciary committee of Her Majesty's Privy Council, for his opinion, and he promptly replied: "I think the evidence almost conclusive. * * * * As the matter is represented to me to be urgent, I advise that the principal officer of the customs at Liverpool be immediately applied to, under 59 Geo. III, cap. 69, to exercise the powers conferred upon him by that section to seize the vessel, with a view to her condemnation, an indemnity being given to him, if he requires it. It would be proper at the same time to lay a statement of the fact before the Secretary of State for Foreign Affairs, coupled with a request that Her Majesty's Government would direct the vessel to be seized, or ratify her seizure if it has been made."[3] On the next day (the 17th) the commissioners of customs advised the commissioners of the Treasury that the collector at Liverpool had been informed by them "that they do not consider there is *prima-facie* proof sufficient in the Consul's statement to justify the seizure of that vessel, and have instructed him to apprise the Consul accordingly."[4]

On the same day (the 17th) Mr. Adams wrote the Consul directing him "to employ a solicitor and get up affidavits to lay before the collector." That letter was received by the consul on the morning of the 18th and he immediately retained Mr. Squarey.[5] The great difficulty for the solicitor and the Consul with their means of information was "to get direct proof. There were men enough who knew about her, and who understood her character, but they were not willing to testify, and in a preliminary proceeding like this it was impossible to obtain process to compel them. Indeed, no one in a hostile community like Liverpool, where the feeling and sentiment are against us, would be a willing witness, especially if he resided there, and was in any way dependent upon the people of that place for a livelihood."[6]

Mr. Adams instructs the consul to continue to collect proof.

But as early as the 21st, the Consul and his solicitor appeared before the collector and presented to him as witnesses William Passmore, John De Costa, Allen S. Clare, Henry Wilding, and Mathew Maguire, and their affidavits, with that of the Consul, were then taken by the collector, who administered

The consul does so, and presents it to the collector with a request to seize the vessel.

[1] Brit. Case, p. 83.
[2] Brit. App., vol. i, p. 247.
[3] Ibid.
[4] Ibid., p. 187.
[5] Ibid., p. 244.
[6] Ibid., p. 245.

the necessary oaths. Upon this testimony, under oath, the collector was requested to seize the vessel, and the portions of the foreign-enlistment act applicable to the case were read to him.[1]

The witnesses were all present before the collector. He had full opportunity, if he desired, to examine them personally, and thus test the accuracy of their statements or their credibility. This he does not seem to have done, or, if he did, he has not put on record any suspicion as to the reliability of the testimony.[2]

On the same day (the 21st) the collector transmitted the affidavits to the commissioners of customs, stating that he had been requested to seize the vessel, and asked the board to instruct him "by telegraph how I am to act, as the ship appears to be ready for sea, and may leave any hour she pleases."[3]

Law advisers of the customs.

The affidavits were received by the commissioners of customs on the 22d of July,[4] and at once referred to the solicitor of customs, who, with his assistant, immediately advised the board that the evidence submitted was not sufficient to warrant the seizure or detention of the vessel. The assistant solicitor said "the only justifiable grounds of seizure under section seven of the act would be the production of such evidence of the fact as would support an indictment for the misdemeanor under that section."[5] On the same day (the 22d) the board informed the collector that, as they were advised by their solicitor, the evidence was not sufficient to justify a seizure, and he should govern himself accordingly, but they added: "The solicitor has, however, stated that if there should be sufficient evidence to satisfy a court of enlistment of individuals, they would be liable to pecuniary penalties, for the security of which, if recovered, the department might detain the ship until these penalties are satisfied or good bail given; but there is not sufficient evidence to require the customs to prosecute. It is, however, competent for the United States Consul, or any other person, to do so at their own risk if they see fit."[6]

No copy of the opinion of the solicitor or his assistant was sent to the Consul or Mr. Adams, but on the 23d of July the collector advised the Consul that the board, upon the advice of their solicitors, had concluded the evidence submitted was not sufficient to justify any steps being taken against the vessel, but he added: "It is, however, considered to be competent for the United States Consul to act at his own risk if he should think fit."[7]

This last clause attracted the attention of the Consul at once, and Mr. Squarey called upon the collector and asked its meaning. "His response was that this was copied from the letter addressed to him by the board." Mr. Squarey, of course, advised the Consul he had no power to stop the vessel; that the power to detain her was lodged with the collector.[8] The collector did not intimate that the board referred in their instructions to the prosecution of the individuals and to a possibility of detention by them in case of such a prosecution. But if he had, it is not easy for the United States to discover why they should be called upon to prosecute individuals criminally in the courts of Great Britain for a violation of its municipal law. It was not the punishment of in-

[1] American Appendix, vol. vi, p. 395.
[2] British Case, p. 87.
[3] Ibid.
[4] British Case, p. 90.
[5] British Appendix, vol. i, p. 188.
[6] Ibid.
[7] British Appendix, vol. i, p. 248.
[8] British Appendix, vol. i, p. 246.

dividuals they sought. They asked the detention of the vessel and by that means the prevention of a crime against the law of nations.

On the same day (the 22d) the affidavits, and the action taken upon them by the board of commissioners of customs, were, by the board, submitted to the lords commissioners of the Treasury, with the suggestion that, if they had any doubt, it might be advisable to take the opinion of the law-officers of the Crown,[1] and at once the Lords Commissioners of the Treasury transmitted to the Foreign Office copies of the papers received from the commissioners of customs, with a statement that the vessel was "nearly ready for sea."[2]

Proof submitted to the treasury, July 22.

On the same day (the 22d) Mr. Adams transmitted to Earl Russell copies of the same affidavits "tending," as he said, "to establish the character and destination of the vessel."[3] Upon the 23d the papers from the commissioners of customs were sent from the Foreign Office to the Law-Officers, with a request for consideration and an opinion at their "earliest convenience."[4]

Also, to Earl Russell.

On the 23d, also, the Consul and his solicitor, having heard from the assistant solicitor of the customs that the previous affidavits were not considered sufficient and that the collector had been directed not to detain the vessel, procured further affidavits from Edward Roberts and Robert John Taylor.[5] They also procured a further opinion from Mr. Collier, predicated upon the eight affidavits which had then been obtained, in which he used this significant language:

Additional proof.

Opinion of Mr. Collier.

> I have perused the above affidavits, and I am of opinion that the collector of customs would be justified in detaining the vessel. Indeed, I should think it his duty to detain her; and that if, after the application which has been made to him, supported by the evidence which has been laid before me, he allows the vessel to leave Liverpool, he will incur a heavy responsibility, a responsibility of which the board of customs, under whose directions he appears to be acting, must take their share. It appears difficult to make out a stronger case of infringement of the foreign-enlistment act, which, if not enforced on this occasion, is little better than a dead-letter. It well deserves consideration whether, if the vessel be allowed to escape, the Federal Government would not have serious grounds of remonstrance."[6]

The additional affidavits were on the same day presented by Mr. Squarey, with the opinion of Mr. Collier, to the commissioners of the customs, with a letter in which he said:

Presented with affidavits to the customs, July 23.

> I learned this morning from Mr. O'Dowd that instructions were forwarded yesterday to the collector at Liverpool not to exercise the powers of the act in this instance, it being considered that the facts disclosed in the affidavits made before him were not sufficient to justify the collector in seizing the vessel. On behalf of the Government of the United States, I now respectfully request that this matter, which I need not point out to you involves consequences of the gravest possible description, may be considered by the board of customs on the further evidence now adduced. The gunboat now lies in the Birkenhead Docks, ready for sea in all respects, with a crew of fifty men on board; she may sail at any time, and I trust that the urgency of the case will excuse the course I have adopted of sending these papers direct to the board, instead of transmitting them through the collector at Liverpool, and the request which I now venture to make, that the matter may receive immediate attention.[7]

The Board on the same day referred all the papers to their solicitor, whose assistant reported that he could not concur in the views of Mr. Collier, but "adverting to the high character

Action of the board.

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[1] British Case, p. 91.
[2] Ibid.
[3] Ibid.
[4] Ibid.
[5] Dudley to Seward, British Appendix, vol. i, p. 245; Squarey to Gardner, Ibid., p. 194.
[6] British Appendix, vol. i, p. 196; British Case, p. 93.
[7] British Appendix, vol. i, p. 194.

which he bears in his profession, I submit that the Board might act judiciously in recommending the Lords of the Treasury to take the opinion of the Law-Officers of the Crown."[1] On the same day (the 23d) the papers were sent from the Foreign Office to the Law-Officers, with a request for an opinion at their earliest convenience.[2] On that day also Mr. Squarey called at the Foreign Office and, ascertaining that the papers had been sent to the Law-Officers, but that an opinion had not up to that time been received, obtained from the Under Secretary, upon his "representation of the extreme urgency of the case," a promise that the opinion should be sent for at once.[3]

Further evidence submitted by Mr. Adams

On the 24th Mr. Adams also transmitted to Earl Russell copies of the same additional affidavits and the opinion of Mr. Collier.[4] Mr. Collier was also retained by the Consul to institute proceedings for condemnation in case the seizure was made.[5]

On the 25th another affidavit was presented by Mr. Squarey to the customs authorities, from whom it found its way on the 26th through the Foreign Office to the Law-Officers, the opinion of the solicitor of the customs being still adverse to the detention.[6] On the 26th also, Mr. Squarey again called the attention of the secretary of the customs to the matter, and said he "had hoped that, ere this, the decision of the Lords Commissioners of Her Majesty's Treasury might have been made known particularly, as every day affords opportunities for the vessel in question to take her departure." To this the secretary replied that, "in the absence of instructions from their lordships, the board are unable to give any directions in regard to the gun-boat in question."[7]

Thus, on the 26th, ended the labors performed by the representatives of the United States. The Consul, in making his report to the secretary of state of his Government, after detailing what had been done by him and those with whom he had been associated, said, "I have done about all that I can do to stop this vessel; much more, I think, than this Government ought to require any friendly government to do. My counsel say I can do no more."[8] The United States confidently believe the Arbitrators will concur in this opinion of the Consul.

The entire proof was in the possession of the Law-Officers of the Crown on the 26th. Substantially it was all there on the 23d. The affidavit of Redden, presented after that date, simply confirmed the already existing proof. That it was sufficient is shown by the opinion of the Law-Officers of the Crown, given as soon as it was examined. Even the first letter of the Consul, written on the 21st of June, and considered by the Law-Officers on the 30th, was sufficient to show that "grounds of reasonable suspicion" existed at that time and called for an inquiry into the truth. After that followed the letter of the 9th of July, with its more particular statement of details; then the affidavits of the 21st; then the affidavits of the 23d, and the pointed opinion of the most eminent counsel; then the affidavit of the 24th; and at all times cautions by the officers of the United States against delay and representations of the extreme urgency of the case. The vessel was in the dock. From the commencement, the builders were not disposed to reply to any question with reference to her destination after she left Liverpool. As early as the 21st of

[1] Brit. Case, p. 94.
[2] Ibid.
[3] Brit. App., vol. i, p. 248.
[4] Brit. App., vol. i, p. 246.
[5] Brit. Case, p. 94.
[6] Brit. Case, 95.
[7] Am. App., vol. vi, p. 405.
[8] Brit. App., vol. i, p. 246.

July it was known to the collector she had her coal on board, and might leave any hour she pleased.[1]

On the 23d the commissioners of customs were advised "that she was ready for sea in all respects, with a crew of fifty men on board; she may sail at any time."[2] On the 28th she was moved from the dock into the river; the men had taken their clothes and beds on board, and received orders to hold themselves in readiness at any moment. She had no register or clearance, but the collector said that was not necessary and that she could go anywhere without.[3] She remained at anchor in the river until 11 or 12 o'clock of the 29th and "was seen from the shore by thousands of persons."[4] The customs officers were on board when she started, and only left her when the tug left.[5]

Her Majesty's government agree to keep a watch on the vessel.

During all this time Her Majesty's Government was under its promise to Mr. Adams, made as early as the 4th of July, that "the officers at Liverpool will keep a strict watch on the vessel, and that any further information that may be obtained concerning her will be forthwith reported."[6]

The law-officers think the vessel should be detained.

After the vessel had sailed, but not before, the Law-Officers announced their opinion that, upon the evidence furnished by the United States, she should be detained.[7] At what hour in the day this opinion was actually given does not appear, but it was agreed upon on the evening of the 28th, the same day that the papers were considered.[8] It was said by Earl Russell to Mr. Adams at a conference on the 31st of July that a "delay in determining upon it [the decision] had most unexpectedly been caused by the sudden development of a malady of the Queen's advocate, Sir John D. Harding, totally incapacitating him for the transaction of business. This had made it necessary to call in other parties, whose opinion had been at last given for the detention of the gunboat."[9] And in the British Case it is said: "One of Her Majesty's ordinary legal advisers, the Queen's Advocate, now deceased, was at that time seriously ill of a malady from which he never recovered, and this was mentioned at the time (on the 31st July, 1862) by Lord Russell to Mr. Adams, as a circumstance which had occasioned some delay."[10]

Illness of Sir John Harding.

The United States find among the documents and evidence furnished by Her Majesty's Government for the information of the Arbitrators eight opinions, given by the Law-Officers of the Crown previous to the 29th of July. Of these, all before that which was given on the 30th June, upon the representation of Mr. Adams under date of the 23d, were signed by Sir John D. Harding, the Queen's advocate, Sir William Atherton, the Attorney-General, and Sir Roundell Palmer, the Solicitor-General, or by the Attorney-General alone. That of the 30th of June was signed by the Attorney-General and the Solicitor-General. From this circumstance the United States infer that the Queen's Advocate was unable to attend to his duties as early as that date, (the 30th June,) and that then the opinion of the other distinguished gentlemen who were the legal advisers of Her Majesty was considered sufficient; and they also infer that it

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[1] Edwards to Commrs. of Customs, Brit. App., vol. i, p. 188.
[2] Squarey to Gardner, Brit. App., vol. i, p. 194.
[3] Dudley to Adams, Am. App., vol. vii, p. 76.
[4] Mr. Laird in the House of Commons, Am. App., vol. v, p. 694.
[5] Ibid., Am. App., vol. iv, p. 528; Hansard, vol. clxx, p. 90.
[6] Brit. Case, p. 84.
[7] Ibid., p. 95.
[8] Sir Roundell Palmer in the House of Commons, Aug. 4, 1871, Am. Case, p. 373.
[9] Adams to Seward, Brit. App., vol. i, 249.
[10] Page 118.

was not necessary on the 23d of July to call *in* new parties, but only to call *upon* the old. The opinions previous to June 30th will be found in British Appendix, vol. ii, pages 2, 16, 32, 98, 100, 138; that of the 30th June, in vol. i, page 181.

On the 28th of July the solicitor of the Consul wrote the secretary of the commissioners of customs that he had every reason to believe the vessel would sail on the 29th; and on the morning of the 29th telegraphed him she had gone. The letter reached the secretary before the telegram.[1]

Escape of the Alabama.

When this information was received, therefore, by the commissioners of customs, the vessel could not have been far from Liverpool, perhaps not yet out of sight of some of "the thousands of persons" who "from the shore" had seen her "anchored in the river." Yet no order was given for her pursuit. In another case it *might*, but in the present the United States are inclined to think it *will not*, surprise the Arbitrators to learn that the opinion of the Law-Officers of the Crown advising the detention of the vessel, delivered at the Foreign Office on the 29th, was not made known to the commissioners of customs "until 4 p. m. on the 31st of July, or two days after the Alabama had left the Mersey, and twelve hours after she had finally sailed from Moelfra Roads."[3]

She was accompanied as she left Liverpool by the tug Hercules, which "kept in sight of her until she lay to, about a mile off the Bell Buoy, and about fourteen miles from the Canning Dock." The tug returned to Liverpool about 7 p. m. of the 29th, bringing back from the "new gun-boat" "some of Mr. Laird's workmen and riggers."[3]

Inefficiency of the subsequent proceedings.

On the morning of the 30th, the Consul called in person upon the collector and informed him that the tug was then in port, having returned from the Alabama the evening previous; that she reported the Alabama cruising off Port Lynas, and that she (the tug) was then taking on board men and equipments to "convey down to the gun-boat."[4]

The collector sent the surveyor to the tug and he reported that he found a considerable number of persons on deck, "some of whom admitted to me that they were a portion of the crew and were going to join the gun-boat." He also informed the collector that it was said she had cruised off Port Lynas the night before.[5]

After this the Hercules left Liverpool and went to the Alabama, finding her at Beaumaris Bay about 3 o'clock in the afternoon of the 30th, She remained with her until about midnight and then returned to Liverpool."[6]

The tug was not followed. Her movements were not watched. No telegrams were sent to the customs officers or any other representative of Her Majesty's Government at Port Lynas, Beaumaris, or any other station or district in the vicinity of where the Alabama was known to have been. She arrived near Port Lynas, at Moelfra Roads, at 7.38 in the evening of the 29th, and remained there at anchor until 3 o'clock in the morning of the 31st.[7]

This was ascertained by the collector at Beaumaris, and reported by him to the secretary of the customs on the 2d of August, in reply to a telegram addressed to him on the 1st. Had such telegram been sent

[1] Brit. Case, p. 96.
[2] Report Commrs. Customs, Brit. App., vol. i, p. 226.
[3] Brit. Case, p. 97.
[4] Brit. Case, p. 96; Am. App., vol. vi, p. 407.
[5] Brit. Case, p. 97.
[6] Ibid.
[7] Ibid., p. 98.

on the 30th, when the Consul informed the collector at Liverpool of what had been learned from the tug, the vessel might have been stopped. At least she could not have communicated with the tug. This is apparent from what was done by the collector at Beaumaris on the 1st, when he did receive his instructions.[1]

Nothing was done until the 31st of July, when there was suggested to the Duke of Newcastle the propriety of sending the Governor of the Bahamas a copy of the report of the Law-Officers of the Crown of the 29th;[2] and at 7.30 p. m. a telegram was sent to the customs officers at Cork to seize her if she arrived at that port.[3]

On the 1st of August similar orders were sent to the officers at Beaumaris and Holyhead, the instructions to send them not having been given the evening before until after the telegraph offices to those places had been closed.

The first telegram to Cork was sent more than thirty hours after the collector had been advised by the surveyor of the port, who had obtained his information from the master of the tug, that the Alabama had been the night before cruising off Port Lynas, and that the tug was about to start from Liverpool to meet her. The excuse for sending to Cork was that Mr. Squarey on the 29th had advised the collector he had reason to believe she had gone to Queenstown;[4] but mention is omitted of the fact that afterward advice had been received that, up to the time of the departure of the Hercules, on the 30th, she was at some point nearer to Liverpool, at which she was to receive her crew and supplies from the tug.

In view of these facts, the United States believe the Arbitrators will have no difficulty in agreeing with Earl Russell in his opinion, as subsequently expressed to Mr. Adams, and reported by himself to Lord Lyons on the 27th of March, 1863, that "the cases of the Alabama and the Oreto were a scandal, and in some degree a reproach to our laws."[5] This opinion he repeated on the 16th of February, 1864, in the House of Commons, when he said:

Earl Russell thinks this a scandal.

> I say that here as I said it in that dispatch; I say that, having passed such a law in the year 1819, it is a scandal and a reproach that one of the belligerents in this American contest has been enabled, at the order of the confederate government, to fit out a vessel at Liverpool in such a way that she was capable of being made a vessel of war; that, after going to another port in Her Majesty's dominions to ship a portion of her crew, she proceeded to a port in neutral territory, and there completed her crew and equipment as a vessel of war, so that she has since been able to capture and destroy innocent merchant-vessels belonging to the other belligerent. Having been thus equipped by an evasion of the law, I say it is a scandal to our law that we should not be able to prevent such belligerent operations.[6]

The Arbitrators will also readily find that the scandal was not the fault of the *law*, but of its *execution*.

As was truly said by Mr. Cobden in the House of Commons, on another occasion, July 23, 1863, in reference to the iron-clads:

Mr. Cobden's views.

> I do not think it is very difficult to find out for what government any vessel which is being built in this country is intended, if it be intended for a government which can legitimately come to this country to buy a vessel.[7]

And the same distinguished statesman, on the same occasion, said, and said truly:

> I perceive a fallacy which runs through Lord Russell's dispatches and the solicitor-

[1] Brit. Case, p. 98.
[2] Brit. App., vol. i, p. 202.
[3] Ibid., p. 205.
[4] Brit. App., vol. i, p. 203.
[5] Am. App., vol. i, p. 585; Brit. Blue Book, (North America,) No. 1, 1864, p. 2.
[6] Am. App., vol. v, p. 528; Hansard's Parliamentary Debates, vol. clxxiii, pp. 634, 634.
[7] Am. App., vol. v, p. 690.

general's speeches. They constantly confound two very different things, namely, the evidence necessary to detain a vessel and the evidence necessary to convict a vessel. The consequence is that we refuse to interfere until Mr. Adams has brought forward conclusive evidence on oath that is sufficient to convict. * * * The departure of that privateer [the Alabama] might have been prevented. That vessel, according to Lord Russell's dispatch, left the port of Liverpool without a clearance, clandestinely * * * but the government might have prevented that. They had grounds for suspicion and might have said to the collector for the port: "Before this vessel leaves or has her clearance we must be satisfied on these points;" and to prevent her leaving without a clearance, they might have put custom-house officers on board. I maintain that you have power to do that under your customs consolidation act.[1]

Want of due diligence: in what it consisted.

That act provides (section 13) "that the commissioners of customs, or the collector or comptroller of any port under their directions, may station officers on board any ship while within the limits of any port in the United Kingdom;" and (section 145) that "before any ship shall depart in ballast from the United Kingdom for parts beyond the seas, not having any goods on board except stores from the warehouse borne upon the victualling bill of such ship, nor any goods reported inward for exportation in such ship, the collector or comptroller shall clear such ship in ballast, by notifying such clearance and the date thereof on the victualling bill, and deliver the same to the master of such ship as the clearance thereof, and the master of such ship shall answer to the collector or comptroller such questions touching her departure and destination as shall be demanded of him." And again, (section 146,) "Any officers of customs may go on board any ship after clearance outward within the limits of any port in the United Kingdom, or within four leagues of the coast thereof, and may demand the ship's clearance."[2] It is true, there is no provision for a forfeiture of the ship, and perhaps at that time there was no penalty imposed upon a master for a failure to comply with these provisions, but when Her Majesty's Government enacts that "before any ship shall depart" from the United Kingdom certain things shall have been done, there will be found somewhere, the United States believe, some power by which she can be detained until such things are done.

Subsequently, in the case of the Laird iron-clads, the law as it stood when the Alabama escaped, was used and made effectual. When the Government was afterward called upon in the House of Commons to answer for the seizure of those vessels, and inquired of as to the authority by which it was made, an elaborate and conclusive reply was given by the Attorney-General in a speech from which extracts have already been presented for the consideration of the Arbitrators.[3]

Now, what was done in the case of the iron-clads? Earl Russell requested the secretary of the treasury to "move the Lords Commissioners of the Treasury to desire that those vessels may be prevented from leaving the port of Liverpool until satisfactory evidence can be given as to their destination; or, at all events, until the inquiries which are now being prosecuted with a view to obtain such evidence shall have been brought to a conclusion."[4]

In consequence of this request, one of Her Majesty's ships of war was

[1] Am. App., vol. v., p 693.

[2] Am. App. Counter Case, 1158, 1165, 1166.

[3] Ante, pp. 78, 88.

[4] Brit. App., vol. ii, p. 352. On the 26th October, 1863, the law-officers of the Crown, on being inquired of as "to the course which, under the circumstances, * * should be adopted" by Her Majesty's Government in respect to these iron-clads, replied, "We are of opinion that it is competent to them to direct those vessels to be detained in any place which the commissioners of Her Majesty's customs may think fit to order under section 223 of 16 and 17 Vict., cap. 107, (the customs law consolidation act,) which is incorporated by reference into the foreign-enlistment act, 59 Geo. III, cap. 69, sec. 7." Brit. App., vol. ii, p. 419.

placed on the watch, and the vessels did not leave port. Had the law been executed in the same manner with respect to the Alabama, the present Tribunal would never have been called upon to consider the subject now under discussion. When the builders appeared not disposed to reply to any question with reference to her destination after leaving port, there were reasonable grounds for supposing that the destination was an illegal one, and the Lords Commissioners of the Treasury could and should have been moved to prevent her leaving until satisfactory evidence was given that it was lawful.

Much stress is laid in the Case presented by Her Majesty's Government upon the fact, that while the attention of Mr. Adams and the Consul had long been given to the vessel and she was launched as early as the 15th of May, no representation had been made to Earl Russell in respect to her until the 23d of June, and this is considered of sufficient importance to be made the subject of a second reference in the Counter Case.

The 23d of June, the Arbitrators will notice, was more than one month before she sailed; sufficient time certainly to have enabled the Government to detain her, if it had been so inclined, upon information after that time obtained. But it will also be remembered that the vessel had not escaped the notice of the customs officers,[1] and they took no action, although it was but a few weeks before that the Oreto had been permitted to escape, and was then known to have arrived at Nassau, a port entirely inconsistent with an innocent destination. In fact, on the morning of the 28th of July, the day before the Alabama sailed, and before she was moved out of the dock into the river, the Journal of Commerce, one of the public prints at Liverpool, contained an account of the proceedings which were being carried on against the Oreto at Nassau.[2]

It was not *time* for action which the officers of the Government required, but *inclination.*

Again, it is said she was not overtaken by the Tuscarora, which had been brought to Southampton by Mr. Adams for the very purpose of intercepting her; nor by any other of the vessels of war of the United States until finally destroyed by the Kearsarge. No better answer to this can be given than in the words of Sir Thomas Baring in the House of Commons, on the 13th of May, 1864, when he said, that "even with our cruisers afloat it would not be easy to pick up an Alabama;"[3] or in those of Mr. Cobden, in the same debate:

> Perhaps nothing is more difficult, not to say impossible, than to find a ship on the ocean after she has once got out of sight. Nelson himself passed many months trying to find a fleet of five hundred sail going from France to Egypt. You may find a vessel in a harbor just as Nelson found the French fleet at the Nile; but even if you should find an American cruiser in a harbor, by your own rules you must allow her to escape, because you say she must have a start of twenty-four hours.[4]

The latter gentleman on another occasion, July 23d, 1863, also said:

> Now, when still the great bulk of our commerce is carried on by sailing-vessels, two or three steamers, built especially for speed, may harass, and, in fact, may render valueless, the mercantile marine of a whole nation. I have heard it said, "O, if it were our case, we should soon catch those vessels." * * I have four times crossed the Atlantic, and sailed for two thousand miles without seeing a strange sail. The ocean is a very wide place. You cannot follow a vessel when it has once got out to sea with any chance of catching it. You have no stations where you can hear of it, and no road which you can follow with the chance of catching it.[5]

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[1] Brit. Case, p. 83.
[2] Am. App., vol. vii, p. 76.
[3] Am. App., vol. v, p. 579.
[4] Ibid., p. 593.
[5] Am. App., vol. v, p. 590.

Especially does this difficulty exist if the laws and regulations of neutrality are not strictly enforced. In January, 1863, Commodore Wilkes, of the United States Navy, wrote to the Secretary of the Navy of his Government:

> The fact of the Florida having but a few days' coal, makes me anxious to have our vessels off the Martinique, which is the only island they can hope to get any coal or supplies at, the English islands being cut off under the rules of Her Majesty for some sixty days yet, which precludes the possibility, unless by some chicanery or fraud, the hope of their getting coal and comfort there; therefore the island of Martinique it seems to me to be the only one to which they will attempt to resort.[1]

The Florida did get coal at Barbados, an English island, and the plans of Commodore Wilkes failed.

Armament from the Bahama.

The Alabama having escaped, the British steamship Bahama cleared on the 13th of August from Liverpool for Nassau with her armament, shipped by Fawcett, Preston & Co.[2] The Bahama also had on board Captain Raphael Semmes, who afterward commanded the Alabama, and some officers and seamen, as passengers.[3] The English bark Agrippina also cleared from London in August for Demerara with a cargo of coal and munitions of war.[4]

At Angra Bay, in the Azores, which "had been used and abused by corsairs and pirates during centuries,"[5] on the 22d and 23d of August, this armament, coal, ammunition, and stores, and these officers and seamen, were transferred, under the British flag, from these vessels to the Alabama. On the 24th, Captain Semmes, with his officers, took possession of the Alabama and mustered the crew, eighty-four in number and mostly British subjects.[6] The English ensign was hauled down and the flag of the insurgents hoisted.[7] Thus armed, manned, and equipped, the Alabama sailed from the Azores as a cruiser of the insurgents.

At Martinique.

On the 18th of November she arrived at Martinique, and anchored in the harbor of Fort de France.[8] She went there to coal, arrangements having been made to meet the bark Agrippina, (the same that had taken part of her outfit to Angra,) which had arrived about one week previous with a cargo of coal from an English port.[9] On the 5th of September Mr. Adams had forwarded to Earl Russell a letter from the consul at Liverpool, stating that the Agrippina was to carry out another cargo of coal to the Alabama. On the 25th the commissioners of customs informed the lords commissioners of the treasury that they had no power to interfere.[10]

The Agrippina left port upon the order of Captain Semmes to get under way forthwith and proceed to a new place of rendezvous, as "it would not do for him to think of coaling in Martinique under the circumstances."[11] Martinique was under the jurisdiction of the French Government and not under that of Her Majesty.

On the evening of the 19th the Alabama herself left port, the United States steamer San Jacinto having appeared in the offing.[12] On the afternoon of the 20th she joined the Agrippina, and the two ran together

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[1] Am. App., vol. vi, p. 338.
[2] Brit. Case, pp. 100, 101, 104.
[3] Ibid., p. 104.
[4] Ibid.
[5] Am. App., Counter-Case, p. 1013.
[6] Brit. Case, p. 105.
[7] Brit. App., vol. i, p. 214; Brit. Case, p. 105.
[8] Brit. Case, p. 107.
[9] Brit. App., vol. i, p. 257; Am. App., vol. vi, p. 491.
[10] Brit. App., vol. i, p. 213.
[11] Am. App., vol. vi, p. 491.
[12] British Case, p. 107.

to their concerted anchorage in Blanquilla, "one of those little coral islands that skirt the South American coast, not yet fully adapted to the habitation of man."[1]

They remained there five days, the Alabama coaling and making other necessary preparations for sea, when the coal-ship, which had still another supply of coal on board, was dispatched to another rendezvous, the Arcas, little islands in the Gulf of Mexico, off the coast of Yucatan.[2] This new rendezvous was reached by both vessels on the 23d of December.[3] The Alabama remained at the Arcas a week, coaling, repairing, and refitting. At the end of that time the Agrippina was put under sailing orders for Liverpool to report to Captain Bullock for another cargo of coal, to be delivered at Fernando de Noronha, another rendezvous agreed upon.[4]

On the 11th of January Captain Semmes engaged and sunk the United States gun-boat Hatteras twenty-five miles southeast of Galveston, Texas, one of the ports of the insurgents. In the engagement the Alabama received "six large shot-holes at the waterline."[5] Destroys the Hatteras.

On the evening of the 20th she arrived at Port Royal, in the island of Jamaica, and within the jurisdiction of Her Majesty's Government, "to repair damages sustained in the action," and to land prisoners.[6] The distance from the place of the engagement to Jamaica was about fifteen hundred miles. On arriving Captain Semmes applied to the naval officer in command at the station for permission to land his prisoners, repair damages, and to receive coal and supplies, stating it was absolutely necessary the damages "should be repaired before he could proceed to sea with safety."[7] This was the first British port the vessel had visited after her escape from Liverpool. At Jamaica, January 20, 1863, repairs and lands prisoners.

In this connection it will be recollected by the Arbitrators that on the 31st of July, after her escape, Earl Russell suggested to the Duke of Newcastle "the propriety of a copy of the inclosed report (that of the Law-Officers, of the 29th of July) being sent to the Governor of the Bahamas."[8]

On the 16th of September, after the receipt at London of information of the release of the Oreto at Nassau, the Law-Officers were inquired of whether it would be "necessary to modify the instructions sent to the Governor of the Bahamas" for the detention of the Alabama,[9] and on the 25th they replied that they were of "the opinion that if the vessel 290 should put into Nassau, she ought to be there seized and proceeded against, provided that there be nothing in the condition of the vessel when at Nassau tending to rebut the inference which the law-officers drew from the facts laid before them with respect to the vessel when she lay at Birkenhead."[10]

This was after it was known that the Alabama had been armed and equipped and had started on her cruise, as that fact was communicated by Mr. Adams to Earl Russell on the 4th of September.[11]

After the necessary correspondence between the naval officer at Jamaica and the Lieutenant-Governor of the island, the permission to repair asked for by Captain Semmes on his arrival was granted.[12] This was reported to the Government of Her Majesty, and on the 14th of February Earl Russell informed the Duke of Newcastle that, in his

[1] Am. App., vol. vi, p. 491.
[2] Ibid.
[3] Ibid.
[4] Am. App., vol. vi, pp. 492, 493.
[5] Brit. App., vol. i, p. 264.
[6] Brit. App., vol. i, p. 267.
[7] Ibid., p. 264.
[8] Ibid., p. 202.
[9] Ibid., p. 211.
[10] Ibid., p. 212.
[11] Ibid., p. 209.
[12] Ibid., p. 264.

opinion, the proceedings of the Governor should be approved, but he trusted "the Alabama has been warned to depart as soon as the necessary repairs are finished."[1]

When the Alabama arrived at Jamaica, although she had on board the officers and men of the Hatteras as prisoners, four officers of Her Majesty's ship Challenger, four of the Cygnet, and one of the Greyhound, went on board of her upon visits of courtesy,[2] and the band played the tune called *Dixie's Land* as a compliment to her, "because it is the ordinary usage and custom among the navies of civilized nations to play complimentary tunes to each other on such occasions."[3] It may have been done by the junior officers, "entirely from thoughtlessness," and that the "inconsiderate young man who ordered *Dixie's Land* to be played" was "severely reprimanded;" yet it was done, and the most cordial relations were at once established between the officers of all these ships (the English squadron) and those of the Alabama."[4]

"The fractures made by six large shot or shell near the water-line * * required extensive repairs, which could not be completed by the unskillful workmen hired here before late in the afternoon of the 25th, and the Alabama sailed at 8.30 of the same evening." She "was treated * * exactly as I [the naval commander at the station] shall act toward any United States man-of-war that may hereafter call here."[5] Why she did not remain longer may be inferred from what Captain Semmes said to the Vice-Admiral on his arrival, which was, "If I remain here an hour more than can be avoided I shall run the risk of finding a squadron of my enemies outside, for no doubt they will be in pursuit of me immediately."[6]

At Rata Island.

She arrived at the harbor of Rata Island near the island of Fernando de Noronha,[7] in the jurisdiction of His Majesty the Emperor of Brazil, on the 4th of April, expecting there to meet the Agrippina with coal. That vessel did not arrive and Captain Semmes supplied himself from one of his prizes taken on the day before he entered the port.[8]

While at these islands waiting for his coal, Captain Semmes cruised in the neighborhood and captured two vessels near the shore, and, as was claimed, within the territorial waters. He was entertained by the governor and provided with horses to go about the island. The Governor returned his official visit in uniform. Upon this becoming known to the president of Pernambuco, he "dispatched an officer in the Brazilian steam-vessel Mamanguape to inquire into these statements, to require Captain Semmes to leave the island within twenty-four hours, and to supersede the Governor if what had been asserted should prove to be true."[9]

The inquiry was made, the Governor dismissed, and the Alabama ordered to leave the islands.[10]

This action of the President of the Province was approved by the Government of His Majesty the Emperor.[11]

At Bahia.

On the 11th day of May, the Alabama arrived at Bahia. The bark Castor was also there with coal, but the Government, "taking into consideration the circumstances of suspecting that the

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[1] Brit. App., p. 268.
[2] Ibid., p. 269.
[3] Ibid., p. 270.
[4] Am. App., vol. vi, p. 493.
[5] Brit. App., vol. i, p. 269.
[6] Ibid., p. 264.
[7] Ibid., p. 276.
[8] Am. App., vol. vi, p. 493; Brit. App., vol. i, p. 272.
[9] Brit. App., vol. i, p. 272.
[10] Ibid.
[11] Ibid.

bark had gone direct to that port by preconcerted agreement, refused permission decisively to the commander of the Alabama, who had asked to be permitted to receive the coal from on board the bark."[1]

She arrived at Bahia after the proceedings were commenced to investigate the facts imputed to her at Fernando de Noronha, but before their conclusion. Upon their conclusion an order was made that "the Alabama shall no more be admitted in any port of the empire. She would have suffered the same exclusion from Bahia if she had not presented herself at that port even before proof of her culpability could be obtained, and before the Imperial Government, surprised by such audacity, could have been enabled to take measures concerning the penalty which in such cases ought to be applied."[2]

Is excluded from Brazilian ports for violation of sovereignty of Brazil.

On the 29th of July the Alabama appeared in Saldanha Bay, in the Cape Colony, and thus came once more within the jurisdiction of Her Majesty's Government.[3] On the 1st of August, Captain Semmes availed himself of "an opportunity offered by the coasting schooner Atlas to communicate with the Cape," and informed the Governor that he had arrived in the bay "for the purpose of effecting some necessary repairs."[4] On the 4th of the same month the Consul of the United States also informed the Governor of the presence of the Alabama in the bay, and asked that she "should be at once seized and sent to England, from whence she clandestinely escaped."[5] The Governor caused a reply to be sent on the next day to the effect that he "has no instructions, neither has he any authority, to seize or detain that vessel."[6]

At Cape Town.

At two o'clock in the afternoon of the same day (the 5th) she appeared off Cape Town, and, at the entrance of Table Bay, within sight of the town and hundreds of persons, captured the American bark Sea Bride.[7]

This was made known to the Governor at once by the United States consul, who claimed that the capture was "clearly within British waters."[8] The Governor caused inquiries to be made of the captain of the Alabama and also of the port-captain and other persons, and satisfied himself that "the vessels were not less than four miles distant from land."[9] It was not denied, however, that this was in full sight from the town. Indeed, that was shown to be the case by the statements of all who were inquired of by the Governor.[10]

After this capture on the 5th, the Alabama came into Table Bay, and Captain Semmes at once announced to the Governor that he had come in for "supplies and repairs," and asked leave to "land prisoners." On being inquired of by the Governor as to the "nature and extent of supplies and repairs" required, he replied: "I shall need some provisions for my crew; * * * and as for repairs, my boilers need some iron work to be done, and my bends require calking, being quite open. I propose to take on board the necessary materials here, and to proceed with all dispatch to Simon's Bay for the purpose of making these repairs."[11]

The vessel remained at Table Bay three days and then went to Simon's Bay, also in Her Majesty's dominions, to calk and refit, arriving there on the 9th. On the way over Captain Semmes chased and captured another American vessel, but, "on

At Simon's Bay.

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[1] Brit. App., vol. i, p. 293.
[2] Brit. App., vol. i, p. 299.
[3] Brit. Case, p. 111.
[4] Brit. App., vol. i, p. 308.
[5] Ibid., p. 301.
[6] Ibid.
[7] Ibid.
[8] Ibid., p. 312.
[9] Ibid., p. 313.
[10] Ibid., pp. 318, 319.
[11] Ibid., p. 314.

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pointing out to him," says Rear-Admiral Walker, "that he had done so in neutral waters, he assured me that it was quite unintentional, and, being at a distance from the land, he did not observe that he had got within three miles of an imaginary line drawn from the Cape of Good Hope to Cape Hanglip, but on discovering it, he did not detain the vessel." This explanation was considered sufficient.[1]

After the capture of the Sea Bride, she was brought within a mile and a half of the shore.[2] Upon the representation of this fact by the Consul of the United States to the Governor, he immediately replied that he did not feel warranted in taking steps to remove the prize crew,[3] upon the ground, as he afterward said, that the vessel was brought in through "inadvertence."[4]

The Tuscaloosa.

After his arrival at Cape Town on the 5th, Captain Semmes "mentioned to the Governor" that he left outside one of his prizes previously taken, the Tuscaloosa, which he had equipped and fitted as a tender, and had ordered to meet him in Simon's Bay, as she also stood in need of supplies."[5]

On the 8th this vessel arrived at Simon's Bay. She was "a bark of five hundred tons, with two small rifled twelve-pounder guns and ten men, and was captured by the Alabama on the 21st of June last, off the coast of Brazil, cargo of wool still on board."[6] She had never been condemned by a prize court, but had been commissioned by Captain Semmes on the high seas as a tender to his ship, one of his lieutenants having been placed in command.[7] The Attorney-General of the Colony was of the opinion that "if the vessel received two guns from the Alabama, or other Confederate vessel of war, or if the person in command of her has a commission of war, or if she be commanded by an officer of the Confederate Navy, in any of these cases there will be a sufficient setting forth as a vessel of war to justify her being held to be a ship of war." And she was admitted into the harbor as such.[8]

The Tuscaloosa remained at Simon's Bay until the morning of the 14th, and the Alabama until noon of the 15th.[9] The Tuscaloosa went to Saldanha Bay, where she found the Sea Bride, driven there, *as was said*, by stress of weather. Both vessels remained two days, then proceeded to Angra Pequena on the west coast of Africa, where they were afterward joined by the Alabama. On leaving the bay they were communicated with by a steamer. The Sea Bride and her cargo were sold at Angra Pequena to an English subject who resided at Cape Town. The Tuscaloosa also landed there her cargo of wool.[10]

The Tuscaloosa and Sea Bride were ordered to Angra Pequena by Captain Semmes. "The object of sending the Tuscaloosa there was to get wool taken out of her and replaced by ballast. * * * Captain Semmes had previously had an offer for the Sea Bride, which he resolved to accept. * * * A day was fixed for both the Tuscaloosa and Sea Bride to be at anchor in the harbor of Angra Pequena. Upon that day Captain Semmes took in the Alabama, met the parties who had made him the offer for the Sea Bride, and completed the sale of her. * * * The wool was taken out of the Tuscaloosa and landed, * * * and is now (September 19) on its way to market."[11]

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[1] Brit. App., vol. i, p. 307.
[2] Ibid., p. 316.
[3] Ibid., p. 317.
[4] Ibid., p. 329.
[5] Brit. Case, p. 113.
[6] Brit. App., vol i, p. 310.
[7] Ibid., p. 308.
[8] Ibid., p. 311.
[9] Brit. Case, p. 113.
[10] Forsyth to Walker, Brit. App., vol. i, p. 324; Walker to Admiralty, ibid., p. 325.
[11] Am. App., vol. vi, pp. 454, 455.

The account of the transaction, as given by Captain Semmes himself, is as follows:

The Tuscaloosa went to sea at daylight on the 14th, and we followed her in the Alabama the next day. The former was to proceed to Saldanha Bay, and thence take the Sea Bride with her to one of the uninhabited harbors, some distance to the northward, and the Alabama was to follow her thither after a cruise of a few days off the Cape. At length, when I supposed the Tuscaloosa and the Sea Bride had reached their destination, I filled away and followed them. On the morning of the 28th of August we sighted the land, after having been delayed by a dense fog for twenty-four hours, and in the course of the afternoon we ran into the bay of Angra Pequena and anchored. This was our point of rendezvous. I found the Tuscaloosa and the Sea Bride both at anchor. I had at last found a port into which I could take a prize. I was now, in short, among the Hottentots, no civilized nation claiming jurisdiction over the waters in which I was anchored. When at Cape Town an English merchant had visited me, and made overtures for the purchase of the Sea Bride and her cargo. He was willing to run the risk of non-condemnation by a prize-court, and I could put him in possession of the prize, he said, at some inlet on the coast of Africa without the jurisdiction of any civilized power. I made the sale to him. He was to repair to the given rendezvous in his own vessel, and I found him here, according to his agreement, with the stipulated price—about one-third the value of the ship and cargo—in good English sovereigns, which, upon being counted, were turned over to the paymaster for the military chest. The purchaser was then put in possession of the prize. I had made an arrangement with other parties for the sale of the wool still remaining on board the Tuscaloosa. This wool was to be landed at Angra Pequena also, the purchaser agreeing to ship it to Europe, and credit the Confederate States with two-thirds of the proceeds.[1]

On the 16th of September the Alabama again arrived at Simon's Bay.[2] Upon his arrival Captain Semmes immediately waited upon Rear-Admiral Walker and "frankly explained" to him, as the Admiral reported to the Secretary of the Admiralty on the 17th, his proceedings at Angra Pequena.[3] On the 19th a full account, as given by Captain Semmes to a reporter on the 18th, was published in the Cape Town Argus.[4]

At Simon's Bay.

Captain Semmes returned to the port at Simon's Bay "for coal, some provisions, and to repair her condensing apparatus."[5] He would not have come back there, "but his condensing apparatus got out of order."[6]

The Alabama remained in port until 3 p. m. of the 24th, when, having completed her repairs and taken on a supply of coal, she sailed for the Indian seas. "The officers of the station were as courteous" as before, and Captain Semmes renewed his "very pleasant intercourse with the Admiral's family."[7]

On the 22d of December she arrived at Singapore, also within the jurisdiction of Her Majesty's Government, and was supplied with coal and provisions. While there, some of the crew having deserted, Captain Semmes "permitted half a dozen picked fellows to come on board, to be shipped as soon as we should get out into the strait."[8]

At Singapore.

On the 20th of March the Alabama again arrived at Simon's Bay. Captain Semmes was "permitted to receive a supply of coal, and complete provisions," after which he put to sea on the 25th.[9] From there she proceeded to Cherbourg in France, at which place she arrived on the 11th of June. On the 19th she left that port to engage the United States steamer Kearsarge, and was sunk in the engagement, many of her officers escaping to Great Britain in an English yacht which came out from Cherbourg to witness the action.[10]

At Simon's Bay: coals and provisions.

Is destroyed by the Kearsarge, June 19, 1864.

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[1] Am. App., vol. vi, p. 498.
[2] Brit. Case, p. 115.
[3] Brit. App., vol. i, p. 325.
[4] Am. App., vol. vi, p. 453.
[5] Brit. App., vol. vi, p. 325.
[6] Am. App., vol. vi, p. 455.
[7] Ibid., p. 499.
[8] Ibid., p. 501.
[9] Brit. App., vol. i, p. 372.
[10] Brit. Case, p. 116.

Reasons why Great Britain is responsible for acts of.

Thus it will be seen that in a cruise of about two years, the Alabama received all her repairs, previous to her arrival at Cherbourg, (except such as could be made in the open sea or at anchorages found in uninhabited islands,) in the ports of Great Britain. She was supplied with coal from Great Britain exclusively, except once when it was taken from one of her prizes and once at Bahia. This last would not, however, have been allowed, had the facts in relation to her conduct in the waters of His Majesty the Emperor of Brazil been known at the time. Having made "Rata Island the base of her operations, for to that place she carried prizes, and from thence proceeded to make others, which she ordered to be burnt, after having kept them there some days at the anchorage place of that island," His Majesty the Emperor of Brazil "ordered that the said steamer be no more received in any port of the Empire."[1]

The "toleration" of such abuses was, in the opinion of His Majesty, "equivalent to permitting the ports of the Empire to serve as bases for operations for the belligerents."[2] Therefore, this first "disrespect to the sovereignty" of that Empire was followed, as soon as discovered, by a peremptory order of banishment.

The United States ask the Arbitrators to contrast this conduct with that of the Government of Her Majesty.

This vessel was built and specially adapted to warlike use in Great Britain, and in violation of the laws of that sovereignty. She sailed from a port in that sovereignty, unarmed, but fitted in all respects to receive her armament; she escaped after her detention by the Government had been determined upon; her armament was constructed in Great Britain; her ammunition, stores, and crew were all provided there; these were shipped by the insurgents on board of English vessels in English ports, transported to the waters of another Government, under the English flag, and there transferred. After her cruise commenced, her coal was supplied from Great Britain in English vessels dispatched from English ports, with instructions to proceed to places of rendezvous arranged by "preconcerted agreement" through agents of the insurgents, having their places of business, and carrying on the operations of their government, upon English soil.

She sailed a distance of more than fifteen hundred miles to reach an English port after an engagement with the enemy only twenty-five miles from one of her own ports, in order to repair damages and refit. While cruising along the coast, going from one port to another in British jurisdiction, within cannon-shot of the shore, and in sight of the town in which was located the seat of the colonial government of Her Majesty, she captured an innocent merchantman and "inadvertently" brought it within the territorial jurisdiction of Her Majesty. While again coasting between other ports of Her Majesty's dominions she again chased and detained another merchantman, but upon being informed by one of the officers of Her Majesty's Navy that this was within the jurisdiction of Her Majesty the captain again put in a plea of "inadvertence" and released his prize.

She brought an uncondemned prize into a port of Her Majesty under pretense of a commission as a tender; her officers there made contracts for the sale to Her Majesty's subjects of the prize cargo of this so-called tender, and of the prize vessel and cargo taken within sight of the land; and, in pursuance of an arrangement made in port, proceeded to an unfrequented island, and completed the sale of the uncondemned prizes

[1] Brit. App., vol. i, p. 295. [2] Ibid., p. 294.

by delivery and receipt of the purchase-money; and afterward, in an English port, her captain "permitted" a few picked fellows to come on board for "shipment" outside of the jurisdiction.

All these facts, save perhaps the last, were made known to Her Majesty's Government as soon as they occurred, yet no "disrespect to the sovereignty" of Her Majesty was discovered; such practices were "tolerated;" the vessel, with her officers, was at all times and on all occasions admitted without hesitation to the hospitalities of all British ports, and "treated exactly as any United States man-of-war would have been." In short, she was permitted at all times to do, in the ports of Great Britain, what, in the opinion of His Majesty the Emperor of Brazil, was "equivalent" to their use as the bases of belligerent operations. During all this time no instructions were ever issued from the home Government which could, in any manner whatever, embarrass the operations of a vessel whose Government had so persistently abused and insulted the power and sovereignty of Her Majesty.

As to the vessel, therefore, the United States believe the Arbitrators will find that she was not only constructed and specially adapted to warlike use within Her Majesty's jurisdiction, and that due diligence was not used to prevent her departure therefrom, but that after her departure she was permitted to use the ports and waters of Her Majesty as a base of naval operations against the United States.

As has been seen, the Tuscaloosa was commissioned as her tender. Before her arrival within the jurisdiction of Her Majesty's Government at the Cape of Good Hope, she had captured and released upon ransom-bond one vessel. After her visit and supplies there, on the 13th of September, 1863, she captured and destroyed one more. As to her, Great Britain permitted her ports to be used as a base of belligerent operations. In addition to this, having been commissioned by the Alabama, her acts are to be treated as the acts of her principal.

VIII.—THE GEORGIA.

The Georgia at Glasgow.

This vessel was built at Dumbarton, on the Clyde, a few miles below Glasgow, by William Denny and Brothers.[1] She was launched on the 10th of January, 1863, and was then called the Virginia. A Miss North, daughter of Captain North, of the insurgent States, was prominent at the launch and gave the ship her name.[2] All this was reported by the consul at Glasgow to Mr. Seward on the 16th of January.[3] On the 9th of October, 1862, Mr. Adams communicated to Earl Russell a copy of an intercepted letter from the insurgent secretary of the navy to Captain North, which fully explained the position that gentleman occupied toward the insurgents.[4]

Notoriety of the construction and purposes of the Georgia.

On the 12th of February an article in the form of a communication appeared in the London Daily News addressed to Lord Palmerston, then at the head of Her Majesty's Government, in which the attention of his lordship was particularly called to the great activity in the ship-building yards for the construction of a fleet of war-steamers alleged to be for the "Emperor of China." Among others, mention was specially made of the two "iron-clads" in the yard of the Messrs. Laird, and also of a steam ram, afterward the Pampero, (or Canton,) being built by Thompson Brothers, at Glasgow, where they were subsequently, when they were approaching completion, seized and detained by the Government. In this article it is expressly stated that, "the term 'Chinese' is in general use in the building-yards of the Clyde and the Mersey, to designate the Confederates, and the 'Emperor of China' has no other signification, in this connection, than to personify Jefferson Davis."[5]

The Virginia is also specially mentioned as one of this class of vessels, and it is then stated that "the Government, indeed, professes a policy of non-interference; but such a profession is neutralized by the moral support which the noble lord, the Secretary of Foreign Affairs, lends to the rebellion, when, in his place in Parliament, he expresses the view that the 'subjugation of the South by the North would be a great calamity.'" On the 17th of February, another article appeared as a communication in the same paper, addressed in the same form, in which this language is used: "It is simply incredible that it (the Government) alone is not cognizant of facts notorious in commercial circles, and the evidence of which is more easily accessible to its agents than to lookers on."[6]

It is quite true that these were anonymous communications in a newspaper, but the newspaper was one of a large circulation and important political influence in London, and the articles professed to state facts. One of these facts was that many vessels were being built in Great Britain, intended for vessels of war; and another, that it was pretended they were for the Emperor of China.

The Oreto and the Alabama had, before that time, escaped from Eng-

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[1] Brit. App., vol. i, p. 423.
[2] Am. App., vol. vi, p. 503.
[3] Ibid.
[4] Brit. App., vol. i, p. 216.
[5] Am. App., vol. vi, p. 505.
[6] Ibid., p. 509.

lish ports under pretense of being intended for foreign governments. They were then under the flag of the insurgents, engaged in the destruction of the commerce of the United States.

It now appears that Her Majesty's Government had ample means within its own control of determining which of the vessels referred to in these articles was and which was not intended for "the Emperor of China." The real Chinese Government had an "agency" at "6 Little George street, Westminster, London." As early as the 10th of September, 1862, Earl Russell caused a letter to be addressed to Mr. Lay, "inspector-general of Chinese customs, then on leave in England,"[1] in which it was said:

> It appears to Her Majesty's Government that, unless you are already provided with a written authority from the Chinese Government for the steps which you are taking to provide that Government with naval assistance, you should procure such authority; and I am accordingly to request that you will take steps for obtaining such authority as soon as possible, although, in the meanwhile, Her Majesty's Government are prepared to act on the assurances of Mr. Bruce, and not interpose any delay in your proceedings.[2]

The Mr. Bruce referred to in this letter, the United States infer from the correspondence which afterward occurred, to have been Sir Frederick Bruce, who was at that time the representative of Her Majesty's Governntent at Pekin, and who subsequently succeeded Lord Lyons at Washington.

On the 9th of October, Mr. Lay addressed a letter to the Foreign Office from the "Chinese government agency, 6 Little George street, Westminister," a copy of which is as follows:

> My absence from England has prevented my receiving before yesterday your letter of the 10th September. With reference to Earl Russell's desire that I should obtain a written authority from the Chinese government for the steps I am taking to provide it with naval assistance, I have the honor to state that I hold such written authority, dated the 15th March, 1862, from my *locum tenens*, Mr. Hart, to purchase and equip a steam fleet, in accordance with instructions from the imperial government. I have since received regular remittances from the foreign customs for that purpose, by direction of Prince Kung. I may add for his lordship's information, that on the 28th of June last I received, through Mr. Hart, a dispatch from the Chinese Foreign Office relative to the proposed fleet. This dispatch prays the inspector-general of customs in earnest terms to use the utmost dispatch in procuring the vessels. It repeats the instructions issued to the governors of various provinces as to the amounts to be contributed by them toward the cost of the fleet; refers to the Emperor's anxiety that no time be lost; and closes with a second earnest appeal to the inspector-general for these reasons "not to lose a day." With respect to the flag for the fleet, I have written for precise authority. As soon as I receive it, I will not fail to apprise Earl Russell of the fact.[3]

The subsequent correspondence preceding the 17th February, 1863, is not given by Her Majesty's Government in the documents and evidence presented for the consideration of the arbitrators; but it is stated in the British Case, on page 47, that "in March, 1862, the Chinese Government gave authority to Mr. Lay, inspector-general of Chinese customs, then on leave in England, to purchase and equip a steam fleet for the Emperor's service, and a sum of money was placed at his disposal for the purpose. Mr. Lay accordingly entered into an agreement with Captain Sherard Osborn, an officer in Her Majesty's navy, according to which the latter was to take command-in-chief of the fleet, receiving orders from the Chinese Government through Mr. Lay. Her Majesty's Government, by orders in council, gave permission to enlist officers and men for this service."

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[1] Brit. Case, p. 47. [2] Brit. App., vol. ii, p. 681. [3] Ibid., p. 681.

The United States cannot state with certainty that such was the fact, but they have reason to believe that some of the vessels mentioned in the first article above referred to, published in the London Daily News, were, in fact, being built under the above-mentioned arrangement, and were, in fact, intended for the "Emperor of China." But it is certain that all were not so intended, and particularly was this the case with the Laird iron-clads, the Pampero (or Canton) and the Virginia, (or Georgia.) It is also certain that the steps "taken to provide the Chinese Government" with "naval assistance" were made use of by the insurgents as a cover to their transactions, and that this was so notorious in commercial circles as to have become the subject of newspaper comment.

When a foreign government comes to the ship-yards of Great Britain to replenish or strengthen its navy, it has, or should have, no concealments. If at peace, it is lawfully there, and Her Majesty's subjects may and do invite contracts for that kind of work; but in such case, the representative of the government should do as was done during the war in the United States by the representative of the Danish government, who, "wishing to spare Her Majesty's Government all the embarrassment possible, came forward and gave the fullest information that a vessel was being constructed for the Danish Government."[1]

When, therefore, as in this case, vessels suspected to be for warlike use against a nation with which Great Britain was at peace, were being constructed in the ship-yards of the subjects of Her Majesty, and it was said that they were for the use of a nation which could lawfully contract for their construction, Her Majesty's Government had the right, and it became its duty at once, to demand the "fullest information." Answers from a nation that could lawfully contract would be prompt and direct. There would be no necessity for concealment, and consequently none would be attempted.

If Inspector-General Lay, or Captain Osborn, had been requested by Her Majesty's Government to name the vessels actually being constructed under their supervision for the Emperor of China, a prompt and truthful answer might have been expected and would doubtless have been given. So far as appears, no such request was ever made, and the insurgents enjoyed the full benefit of the omission.

It is quite true, that neither Mr. Adams nor any other representative of the United States, at any time brought his suspicions as to the Virginia to the special attention of Earl Russell; or any other officer of Her Majesty's Government, before she left the Clyde. The Consul at Glasgow had strong suspicions as to her character and destination, but he had not and could not, with his means of information, produce "such evidence of the fact as would support an indictment for the misdemeanor;" and nothing short of that, Mr. Adams had been informed in July previous, in the case of the Alabama, would, in the opinion of the solicitor of customs at London, furnish "justifiable grounds of seizure."[2]

The building of vessels for the insurgents upon the Clyde had but just commenced. The consul at Glasgow had not then perfected his arrangements for procuring information, as had been done at Liverpool, where the operations of the insurgents began, and had been continued with so much activity. Consequently the United States could not then comply with the rules that had been already prescribed, and so strenuously insisted upon, in previous cases, for the guidance of the officers of

[1] Mr. Layard in the House of Commons, March 7, 1864, Am. App., vol. iv, p. 499.
[2] O'Dowd's Opinion, Brit. Case, p. 90.

Her Majesty's Government in such matters. Such, however, was not the case with Her Majesty's Government itself. It had in full operation all the machinery by which for years it had been accustomed to carry on its police and revenue departments. It needed only to put this machinery into operation, and suspicions could be raised to the dignity and importance of evidence, or set aside as unfounded.

This was never done. "Facts notorious," "the evidence of which was more easily accessible to the agents of the Government than to lookers on," were passed by without the notice of the government, and this vessel was permitted to escape.

But it is said that, "when surveyed by the measuring surveyor, she presented nothing calculated to excite suspicion; that she had the appearance of being intended for commercial purposes, her framework and plating being such as are ordinary in trading-vessels of her class."[1]

The surveyor's certificate bears date February 4. He commenced his survey on the 17th of January, seven days after her launch, and he visited her on two separate occasions afterwards for the purpose of completing his survey.[2] These visits must, therefore, have all been made previous to the date of his certificate, (February 4.) She was not registered until the 20th of March, nor cleared until the 1st of April, and did not sail until the 2d. The evidence presented is, therefore, only of her appearance on the 4th of February. Her Majesty's government does not appear to have caused any examination to be made after that time; or if it did, it has not seen fit to furnish the arbitrators with the result.

Registry, clearance, and departure.

It is true that after she had sailed and it was known she had already been converted into a cruiser, the collector of the port did say, in a report to the commissioners of customs then called for, that the "officer who performs the tide surveyor's duty afloat, and who visited her on the evening of the 1st instant, to see that the stores were correct, informs me he saw nothing on board which could lead him to suspect that she was intended for war purposes." He also said that he, himself, could "testify that she was not heavily sparred; indeed, she could not spread more canvas than an ordinary merchant steamer."[3]

But this can hardly be looked upon as having the effect of an examination actually made.

On the 14th of February, eight days after the certificate of the surveyor, the first article above referred to appeared in the Daily News. Three days after, on the 17th, the next appeared. The vessel remained in port for nearly two months after these suspicions assumed shape and became "notorious in commercial circles."

That she was specially adapted to warlike use when she left port, is proven by the fact that, as soon as the armament was transferred to her, off the coast of France on the 9th, she set forth as a vessel of war, complete and ready for active service. She needed, when she left Greenock, nothing but arms and ammunition. Those were soon obtained out of Her Majesty's dominions, and without entering any port she commenced her work of destruction.

She was registered on the 20th of March, in the name of one "Thomas Bold, a merchant residing at Liverpool,"[4] as the owner. He was a relative of Lieutenant Maury, her commander.[5] On the 27th she commenced shipping her crew at a shipping office and before a shipping

[1] Brit. Case, p. 122.
[2] Ibid.
[3] Ibid.
[4] Ibid., p. 123.
[5] Dudley to Seward, Am. App., vol. vi, p. 519.

master in Liverpool for a voyage "from Greenock to Singapore and Hong-Kong, (with liberty to call at any port or ports on the way, if required,) and after arrival there to be employed in trading to and from ports in the China and Indian seas, the voyage to be completed within two years by arrival at a final port of discharge in the United Kingdom."[1] Her crew left Liverpool for Glasgow on the 30th March,[2] and they went on board the vessel whilst lying in the Clyde, off the port of Greenock.[3] On the 1st April she cleared from Greenock in ballast for Hong-Kong.[4]

It is said in the British Case, page 123, that "the men believed that this was the real destination of the ship." The United States will reply in the language of one of the distinguished gentlemen who now compose this honorable Tribunal, the Lord Chief Justice of England, on the trial, in 1864, of the parties indicted for procuring the enlistment of the men, and say, "No doubt it was possible they might have been under the delusion that the ship was engaged for a voyage to China;"[5] but they think that, after a consideration of the affidavits and correspondence, found in vol. i, pages 412 to 415, 430 to 439, and 443 of the Brit. App., the Arbitrators will conclude that such a delusion was hardly *probable*. One witness, Thomas Matthews, said in his affidavit, "I understood that the vessel was not going to China, although she would be entered out for that place;"[6] and it is hardly possible to believe that many of the crew did not, when they shipped, have the same understanding.

The Alar.

The steamer Alar cleared from the port of Newhaven on the 4th of April, for Alderney and St. Malo, under circumstances which attracted the attention and excited the suspicions of the collector there. The same night, after her clearance, about thirty men, twenty of whom appeared to have been British sailors, and ten mechanics, arrived by train. Her agent admitted she had munitions of war on board.[7] She took to the Japan her armament and equipment, which were transferred to her off the coast of France, near to Brest. This transfer was completed on the evening of the 9th. On the 6th the collector at Newhaven addressed a letter to the commissioners of customs advising them of the circumstances of suspicion attending the clearance of the Alar, and adding, "leaving no doubt on my mind nor on the minds of any here, that the thirty men and munitions of war are destined for transfer at sea to some second Alabama."[8]

Armament of the Georges.

Mr. Adams gives information to Earl Russell.

On the 8th, Mr. Adams, in behalf of the United States, addressed a note to Earl Russell calling his attention to the Virginia [Japan] and the circumstances of her escape, as well as to the fact that the Alar, loaded with guns, shells, shot, powder, &c., intended for her equipment, was then on the way to her. This note was received at the *foreign office* at 12.45 p. m. of the day of its date.[9] At that time it was supposed by Mr. Adams that the vessels would proceed to, and meet at, the island of Alderney. Instructions were immediately sent, on the request of Earl Russell, to the officers of the Government at that station to take such steps in the matter as they might be advised to do by their legal advisers.[10] No instructions were sent to the naval officers at Plymouth or Portsmouth. No cruisers were sent out.

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[1] Brit. App., vol. i, p. 426.
[2] Dudley to Seward, Am. App., vol. vi, p. 509.
[3] Brit. Case, p. 123.
[4] Brit. App., vol. i, p. 407.
[5] Am. App., vol. iv, 567.
[6] Brit. App., vol. i, p. 443.
[7] Report of collector, Brit. Case, p. 123.
[8] Brit. Case, p. 123.
[9] Brit. App., vol. i, p. 399.
[10] Arbuthnot to Hammond, ibid., p. 401.

The Alar was of only eighty-five tons burden.[1] Of course she could not be expected to take her cargo a great distance. The place from which she cleared was given by Mr. Adams in his letter to Earl Russell. The letter from the collector of customs to the commissioners of customs reached that department of the Government in London on the 7th, and was at once transmitted to the lords commissioners of the treasury.[2] When the letter of the collector reached the treasury, the Alar was "lying to," not having yet reached the Japan. When Mr. Adams's letter reached the Foreign Office, the two vessels had but just joined each other and the transfer of armament had not been commenced.[3]

The Government, however, acted only on the suggestion of Mr. Adams that the vessels were to meet at the island of Alderney. It originated no plans of its own. It did not institute any inquiries for itself; it did not even pay any attention to the suspicions of its own officers. The consequence was that the vessel escaped; and thus Great Britain furnished the insurgents with another completed, equipped, and manned vessel of war ready to prey upon the commerce of the United States. The Navy of the insurgents by this addition was increased to three effective and powerful vessels, only one of which had ever entered their ports, but all of which had proceeded from the ports of Great Britain, with no attempt on the part of Her Majesty's Government to prevent their departure. All these vessels, too, were freely admitted into the ports of Great Britain as vessels of war set on foot legitimately, and without any insult to the sovereignty of Her Majesty.

Insufficient action of Her Majesty's government.

All the facts in relation to the escape of the Japan (afterwards the Georgia) were made known to Earl Russell by Mr. Adams on the 16th of April, through affidavits of two men who had left her at Brest.[4]

After her armament she first made the port of Bahia, on or about the 11th of May, where she went to "meet her coal-ship," the Castor, which had been ordered there from England;[5] but, after taking in a part of her supply, she was "stopped by the authorities," and compelled to get the remainder from the shore.[6] This the United States suppose was for the same reason which was assigned by the Brazilian Government at the same time for refusing to permit the Alabama to coal from the same vessel, to wit, "the circumstance of suspecting that the bark had gone direct to that port by preconcerted agreement." His Majesty the Emperor of Brazil had determined that his ports should not be made a place of rendezvous by belligerents from which to carry on their hostile operations. Banishment, as has been seen, was his penalty for a violation of his neutrality.

At Bahia.

Leaving Bahia the Georgia next stopped at a desolate island called Trinadi, where it had been arranged to meet the English bark Castor, for coal. She remained there about a week waiting for her tender, but, it not arriving, she sailed and captured a vessel which she had sighted from port. The prize was a vessel laden with coal, from which a supply was taken, and the Georgia proceeded on her cruise.[7] Her next port was Simon's Bay, in Cape Colony, in Her Majesty's dominions, where she arrived

At Trinadi.

At Simon's Bay.

[1] Brit. App., vol. i, p. 406.
[2] Gardner to Hamilton, Brit. App., vol. i, p. 405.
[3] Statement of the master of the Alar, Brit. Case, p. 125.
[4] Brit. App., vol. i, p. 412.
[5] Cruise of Alabama, Am. App., vol. vi, p. 493.
[6] Affidavits, Am. App., vol. vi, pp. 522, 524, 527, &c.
[7] Am. App., vol. vi, pp. 523, 525, and 528.

on the 16th of August, requiring "coals, provisions, and calking."[1] She remained there about two weeks, receiving all she needed without objection on the part of the authorities,[2] and then started north. She coaled at Teneriffe about the 10th of October, and arrived at Cherbourg, in France, on the 28th of the same month.[3] There she was admitted into the Government docks, but "her repairs were inconsiderable."[4] She left the roads and sailed from Cherbourg on the 16th of February, 1864. In the mean time she was in constant communication with Great Britain. Recruitment of men for her account was going forward in Liverpool.[5]

At Cherbourg.

During her cruise after leaving Cherbourg no prizes were made, and on the 2d of May she found her way back to Liverpool. She had not been a successful cruiser. Her commercial value in money was worth more to the insurgents than her powers as a vessel of war, and, on her arrival, she was dismantled and offered for sale. Great Britain made no objection to the use of her ports for such a purpose. Her Majesty's Government contented itself with a simple notice to the purchaser that he must purchase at his own risk. This notice may have reduced the amount of the proceeds of the sale, but it kept open the ports of Great Britain to the insurgents as a base for their naval operations. They had no ports of their own. The right of a belligerent to make use of the ports of a neutral for the sale of its ships of war was, to say the least, doubtful. Great Britain had been accustomed to resolve all doubts in favor of the insurgents. This new experiment was therefore tried; a sale was effected, and the proceeds went into the treasury of the insurgents.

At Liverpool.

Sale.

[1] Brit. App., vol. i, p. 307.
[2] Am. App., vol. vi, p. 525.
[3] Brit. App., vol. i, p. 441.
[4] Ibid.
[5] Affidavit of Shanley, Brit. App., vol. i, p. 448; affidavit of Matthews, ibid., p. 443; Queen *vs.* Campbell, Am. App., vol. iv, p. 613.

IX.—THE SHENANDOAH.

Open hostilities were commenced by the insurgents against the Government of the United States on the 12th of April, 1861, by an attack on Fort Sumter, in the harbor of Charleston and State of South Carolina, Previous to that time, W. L. Yancey, P. A. Rost, and A. Dudley Mann had been appointed by the insurgent president "a commission" to the Government of Her Britannic Majesty. They proceeded to London, and on the Saturday previous to the 11th day of May (being the 4th) were admitted by Earl Russell to an informal interview.[1]

General review of facts establishing want of due diligence.

On the 30th of April, Fraser, Trenholm & Co., a branch at Liverpool of the commercial house of John Fraser & Co., at Charleston, became the "financial agents and depositaries" of the insurgent Government, through whom "contracts required abroad" were to be carried out.[2]

On the 10th of May the insurgent congress authorized the president "to cause to be purchased, if possible, otherwise to be constructed, with the least possible delay, in France or England, one or two war-steamers of the most modern and improved description, with a powerful armament and fully equipped for service."[3] On the same day another act was passed making an appropriation "to enable the Navy Department to send an agent abroad to purchase six steam propellers, in addition to those before authorized."[4] Of the sums appropriated by these acts and others which had preceded them, "six hundred thousand dollars" were placed at once in England and agents dispatched abroad to purchase gun-boats.[5]

On the 1st of July the insurgent secretary of war, in a letter of instruction to a Mr. Charles Green, who had been appointed to go to London and act with Captain Huse and Major Anderson in the purchase of arms, &c., desired him to give or cause to be given special attention to the shipments. It is then said, "in this connection it is proper to remark that Captain North, of the Confederate States Navy, is now in Europe to purchase vessels for this Government, and it is probable that, being a British subject, you might secure the shipments under British colors."[6]

About the same time James D. Bullock was appointed "head agent of the confederate navy in England."[7] He immediately went to England and established his "headquarters" at Liverpool, in one of the rooms of the office of Frazer, Trenholm & Co., the "financial agents and depositaries."[8]

As early as the 4th of July the Consul of the United States at that port (Liverpool) informed the head constable of the city and the collector of customs of the port that he had reason to believe Bullock had "come to England for the purpose of procuring vessels to be fitted as

[1] Russell to Lyons, Am. App., vol. i, p. 37.
[2] Am. App., vol. vi, pp. 29 and 182.
[3] Am. App., vol. vi, p. 29.
[4] Ibid., p. 30.
[5] Ibid., p. 31.
[6] Ibid., p. 30.
[7] Testimony of Prioleau, Am. App., vol. vi, p. 186.
[8] Ibid.

privateers to cruise against the commerce of the United States, and that he will make Liverpool the scene of his operations."[1]

On the 14th of August, the above-named commissioners, having on "two different occasions" before "verbally and unofficially informed" Earl Russell of their appointment, took occasion to address to him a formal communication in writing, and in that communication, among other things, said "this Government [that of the insurgents] commenced its career entirely without a navy. * * The people of the Confederate States are an agricultural, not a manufacturing or a commercial, people. They own but few ships. * * But it is far otherwise with the people of the present United States. * * They do a large part of the carrying trade of the world. Their ships and commerce afford them the sinews of war, and keep their industry afloat. To cripple this industry and commerce, to destroy their ships or cause them to be dismantled and tied up to their rotting wharves, are legitimate objects and means of warfare."[2]

On the next day (the 15th) Mr. Adams addressed Earl Russell as follows:

> From information furnished from sources which appear to me entitled to credit, I feel it my duty to apprise Her Majesty's Government that a violation of the act prohibiting the fitting out of vessels for warlike purposes is on the point of being committed in one of the ports of Great Britain, whereby an armed steamer is believed to be about to be dispatched with the view of making war against the people of the United States. It is stated to me that a new screw-steamer, called the Bermuda, ostensibly owned by the commercial house of Frazer, Trenholm & Levy, of Liverpool, well known to consist in part of Americans in sympathy with the insurgents in the United States, is now lying at West Hartlepool, ready for sea. She is stated to carry English colors, but to be commanded by a Frenchman.[3]

To this Earl Russell replied on the 22d of the same month that he had been advised by the Law-Officers of the Crown "there is not sufficient evidence to warrant any interference with the clearance or the sailing of the vessel."[4]

This vessel turned out to be only a "transport," and not an "armed vessel of war;" and the United States admit that the evidence, then in the possession of the two Governments, might not have been sufficient to justify her condemnation by the courts upon the proper proceedings instituted for such purpose; but they insist that the complaint of Mr. Adams, following so closely as it did upon the remarkable communication of the insurgents already quoted, was worthy of being kept in the remembrance of Her Majesty's Secretary of Foreign Affairs. As has been seen, Bullock contracted in Liverpool, shortly after his arrival, for the construction of the Florida; not long after a contract was made for the Alabama; and later still, others for the Alexandra and the Laird iron-clads at Liverpool, and for the Georgia and Pampero, (or Canton,) at Glasgow. A purchase was also made of one of Her Majesty's cast-off gun-boats, the Victor, afterward known as the Rappahannock.[5] The Florida, Alabama, and Georgia (the first two after having been made the subject of special complaint by the United States to Her Majesty's Government) escaped from the ports of Great Britain, and their ravages upon the commerce of the United States formed the subject of much correspondence between the two governments. As early as the 20th November, 1862, Mr. Adams called the attention of Earl Russell to this subject by letter, and in so doing said:

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[1] Am. App., vol. vii, p. 72.
[2] Am. App., vol. i, p. 336.
[3] Brit. App., vol. ii, p. 133.
[4] Brit. App., vol. ii, p. 138.
[5] Am. App., vol. vi, p. 174.

"I have the honor to inform your lordship of the directions which I have received from my Government to solicit redress for the national and private injuries already thus sustained, as well as a more effective prevention of any repetition of such lawless and injurious proceedings in Her Majesty's ports hereafter."[1]

The Alexandra was made the subject of judicial proceedings, and Her Majesty's Government, through the inefficiency of its laws as actually administered, was compelled to pay the insurgents damages and costs for the detention.

The iron-clads were detained, and, to avoid another Alexandra experience, were purchased from the insurgents by Her Majesty's Government at a price which, the United States have reason to believe, did not entail a pecuniary loss upon the sellers. The Pampero (or Canton) was seized, and, by arrangement with the builders, a decree of forfeiture obtained, which was never enforced except for the detention of the vessel until the final defeat of the insurgents. The Rappahannock escaped, but was detained by the Government of France and was never made available against the United States. But she became a subject of annoyance and vexation to Her Majesty's Government, and furnished additional proof that, in the midst of the state of feeling which surrounded Her Majesty's courts of justice in England, her laws could not at all times be made available there to enforce her international obligations and protect her from liability for national wrongs.

An offending officer acquitted by a jury on a trial before a judicial tribunal, was punished by the Government by being put on half-pay for life.

The Navy Department of the insurgents had and maintained its headquarters at Liverpool. Bullock, the "head agent," issued his orders and commissioned his officers from these headquarters. His seamen were recruited there; his officers congregated there, waiting the preparation of the vessels on which they were to cruise, and when the vessels got out of port, clandestinely or otherwise, had no difficulty in finding the means to reach them. Bounties, advances, half-pay notes, and wages were made payable and paid there. When a ship went out of commission or enlistments expired, officers and other seamen made their way back there to the "Department."

In the mean time the British flag was allowed to cover cargoes, contraband of war, intended to pass a blockade maintained by the United States and supply the insurgents with the means of carrying on their operations. Ships were purchased by the insurgents intended for and maintained as "transports," all which were permitted to and did sail under the British flag. Constant complaint of this was made by the United States to Her Majesty's Government, and the reply uniformly came back that international obligations did not make it incumbent upon Her Majesty to interfere.

In the fall of 1864 the insurgents were again without any available Navy. The Florida and the Alabama had been sunk; the Sumter and the Georgia had been dismantled and sold in British ports to British subjects, the proceeds of the sales finding their way from thence into the Treasury of the insurgents. The Tallahassee had succeeded in running the blockade and in making a port of the insurgents after her short though destructive career, but was then held by the blockade maintained by the United States. The Rappahannock was held firm in the hands of the Government of France, and the Chickamauga, although

[1] Adams to Russell, Nov. 20, 1862, Am. App., vol. i, p. 666.

commissioned, was still detained by the blockade. In the mean time the commerce of the United States had largely disappeared. Nearly two hundred vessels, with their cargoes, had been committed to the flames.[1] Over seven hundred, with an aggregate of nearly half a million of tonnage, had been transferred for self-preservation from the flag of the United States to that of Great Britain.[2] All or nearly all of this had been caused by vessels fitted out in the ports of the Clyde or the Mersey. They had been manned and supplied from Great Britain. Their commissioned officers were chiefly from the insurgents; but they were commissioned in Great Britain and took their orders and departure there.

But there was still left in the frozen seas of the North Pacific a little fleet of vessels from which it was supposed the flag of the United States could be floated with safety. This fleet was largely owned, and entirely officered and manned, by bold and daring seamen who made the Arctic seas their home in order that they might supply the inhabitants of more favored regions with such necessaries as those seas alone produced. This little fleet destroyed, and the commerce and carrying trade of the United States would be substantially gone. This "legitimate object and means of warfare," so early brought to the attention of Earl Russell by the "commission" sent from the insurgents, would then have fully accomplished its work. No vessels or cargoes had been condemned as prize and sold, but all had been destroyed.

To accomplish this further destruction a Navy must be provided. It need not be large, but still something must be had. It could not be obtained from France, because "no violation of its neutrality would be permitted,"[3] and work upon vessels of war would not be allowed there unless the builders could satisfy the Minister of Foreign Affairs that they "were honestly intended" for a government other than that of the insurgents.[4] The minister of marine there had also declared that suspected vessels "should not be delivered to the Confederates."[5]

The hospitalities of the ports of Great Britain had never been refused to a ship having a commission of the insurgents. Her Majesty's Government had acknowledged the inefficiency of her laws as enforced in her courts and executed by her officers, yet Her Majesty's prime minister had declared, from his place in the House of Commons, that the Government and people of the United States "must not imagine that any cry which may be raised will induce us (Her Majesty's Government) to come down to this House with a proposal to alter the law."[6]

If by chance a vessel was detained, no pecuniary loss to the insurgents would be likely to follow, for the money invested would be paid back, and, possibly, a profit be added. The "navy agent" and the only efficient "Navy Department" of the insurgents were still tolerated and permitted to maintain "headquarters" at the principal commercial port of the Empire. Great Britain had never yet resented an insult to her neutrality by the insurgents. There never had been so great activity in the construction and purchase of steamers in Great Britain for "transports" as at this time.[7]

Consequently the Navy Department, located in Great Britain, sought there to obtain its means of operation. A vessel known as the Sea King, which, while building at Glasgow, a year previous, had attracted

[1] Am. App., vol. iv, p. 446.
[2] Brit. App., vol. i, p. 504.
[3] Am. App. Counter Case, p. 897.
[4] Ibid., p. 904.
[5] Am. App. Counter Case, p. 916.
[6] Am. App., vol. iv, p. 531.
[7] Bullock to Memminger, and other correspondence, August 23, 1864; Am. App., vol. vi, p. 169.

the attention of the officers of the United States as suspicious, was found in port on her return from a voyage to the East Indies. On the 20th September, 1864, she was purchased and a bill of sale given of her to the father-in-law of the managing partner of the firm acting in Liverpool as "financial agents" of the insurgents.[1] This bill of sale was registered in a public office of Her Majesty's Government on that day.[2]

Purchase of the Sea King.

On the 5th October a crew for that vessel was shipped, at a shipping-office in London, and before a shipping-master, for "a voyage from London to Bombay, (calling at any ports or places on the passage that may be required,) and or any other ports or places, in India, or China or Japan, or the Pacific, Atlantic, or Indian Oceans, trading to and from as legal freights may offer, until her return to a final port of discharge in the United Kingdom, (or Continent of Europe, if required;) voyage not to exceed two years."[3]

The Arbitrators will in all this see a striking resemblance to the circumstances attending the purchase and sending forth of the Georgia eighteen months before. On the 7th October, at 3 p. m., a certificate of sale was filed in the office of the registrar of shipping, in accordance with section 76 of the merchant-shipping act, 1854,[4] by which the owner empowered the master to sell the ship at any port out of the United Kingdom, for not less than £45,000, within six months from the date of the certificate.[5] Her master was Peter S. Corbett, who had previously commanded the insurgent transport Douglass, afterward known as the Margaret and Jessie.

The Sea King was cleared and sailed from London on the 8th of October, with a cargo of coal. She commenced engaging her crew as early as the 25th September.[6]

Her departure.

On the 7th of October, the attention of the Consul at Liverpool was drawn to some suspicious circumstances connected with a screw-steamer called the Laurel, which he understood had been recently purchased by the insurgents,[7] but his knowledge was not such as to justify a presentation of the case to Her Majesty's Government, under the rules prescribed for the action of its officers. Therefore, no report was made by Mr. Adams to Earl Russell. She was cleared from Liverpool on the 8th of October for Matamoros, &c.[8]

As early as the 12th October, an article appeared in the Liverpool Journal of Commerce announcing her sailing and using this language:

Departure of the Laurel with her crew and armament.

> Her cargo is of such a mixed nature that no belligerent State would have the slightest doubt as to its usefulness. * * * But the Laurel must not be supposed to be intended for a cruiser; she is merely a tender, and carries out to a certain latitude guns and ammunition for a new screw-steamer of which Captain Semmes is to take command. * * * To show that Captain Semmes does not go unattended, we may here state that he took with him on board the Laurel eight officers and one hundred men, most of whom served with him on board the Alabama.[9]

There were errors in the statements contained in this article, but the very errors show that the air was at that time filled with rumors, and that intelligent action at the proper time by the Government might have traced these rumors to their source, and, in all probability, prevented this new escape.

The Laurel did, however, clear with the armament of the Sea King

[1] Am. App., vol. vi, p. 560.
[2] Brit. App., vol. i, p. 495.
[3] Ibid., p. 496.
[4] Am. App. Case, p. 1144.
[5] Brit. App., vol. i, p. 495.
[6] Brit. App., vol. i, p. 486.
[7] Am. App., vol. vi, p. 556.
[8] Brit. App., vol. i, p. 492.
[9] Am. App., vol. vi, p. 558.

as cargo, and with all, save one, of her officers (twenty-four) and some (seventeen) seamen as passengers.[1]

Of these officers, five had previously served on the Alabama alone, two on both the Alabama and Sumter, one on the Georgia alone, one on both the Rappahannock and Georgia, and two on the Rappahannock alone; and of the men, five had served on the Alabama. Three of the officers had avoided capture at the time the Alabama was sunk in the engagement with the Kearsarge, by escape upon the English yacht.[2]

Armament of the Shenandoah.

On the 17th October the two vessels, the Sea King and the Laurel, met at the island of Madeira. They proceeded from thence to the island of Desertas, where the armament, and the officers and seamen who came as passengers, were transferred to the Sea King. No bill of sale was ever given by the captain under the certificate of sale. No purchase-money was paid there. The certificate of sale was never returned to the office of the registrar in Great Britain as was required by section 81 of the merchant-shipping act, 1854,[3] and the registered British character of the Sea King remained during her whole career. But the armament transferred, in the same manner as had previously been done in the cases of the Alabama and Georgia, the Sea King became the Shenandoah, an insurgent cruiser. She had, however, no sufficient crew. Of officers and men she mustered not to exceed forty-four. All the seamen were, however, British subjects, and the officers came together on British soil to be placed on board the new cruiser under the protection of the British flag. If a ship of war of the United States had met the Laurel on her passage and taken these officers from her deck, Great Britain would have considered her neutrality violated, and demanded their return amidst the most active preparations for war, as had been previously done in the case of the Trent.[4]

It may be admitted that if the Shenandoah at this point in her history stood alone, and there had been no other cause of complaint against Her Majesty's Government, the United States could not now hold Great Britain responsible for her original escape and armament. But this vessel was purchased in, and armed from, Great Britain, three years and a half after the insurrection in the United States had put on the form of war. The insurgents had found the laws and the Government of Great Britain favorable to their operations. They had, under those laws and under that Government, availed themselves of the "ports of the Clyde and the Mersey," (their only ports,) and made a navy. Under the warfare of that navy, the commerce of the United States, which at the commencement rivalled that of Great Britain, had been transferred to the English flag. Her Majesty's Government had never punished the insurgents for any violation of her neutrality. It had not then even remonstrated. On the contrary, it had tolerated and thus encouraged violations. It seems never to have conceived the idea which was so significantly promulgated by His Majesty, the Emperor of Brazil, that toleration of abuse was "equivalent to permitting the ports of the empire to serve as bases for operations."[5]

The negligence which enabled the Florida and the Alabama to escape fastens itself upon the Shenandoah. The excessive hospitality which had always been extended gave the insurgents to understand, as they rightfully might, that the ports of Her Majesty's dominions could be

[1] Brit. App., vol. i, p. 477.

[2] See Temple's affidavit, Brit. App., vol. i, p. 701; inclosure No. 2, in Mr. Adams to Earl Russell, ibid., 379.

[3] Am. App. Counter Case, p. 1145.

[4] Am. Case, p. 82.

[5] Brit. App., vol. i, page 294.

made the bases of their naval operations, and in consequence they operated from there, and from there alone.

When the commander of the Shenandoah left Liverpool to join her, and take command, he had in his possession a letter from Bullock, bearing date of October, 1864;[1] and when he returned in November, 1865, he addressed Earl Russell as follows:

I commissioned the ship in October, 1864, under orders from the naval department of the Confederate States; and, in pursuance of the same, commenced actively cruising against the enemy's commerce. My orders directed me to visit certain seas in preference to others; in obedience thereto I found myself in May, June, and July of this year, in the Okhotsk Sea and the Arctic Ocean.[2]

Thus she started, under orders issued from Great Britain, to reach the most distant commerce of the United States.

Her first point of destination on the course she was ordered to make was Melbourne, in Her Majesty's dominions. To that port a transport, bearing the name of John Frazer, (one of the firm of John Frazer & Co., at Charleston, of which Frazer, Trenholm & Co., the Liverpool depositary, was a branch,) was sent from England by the insurgent Navy Department with her supply of coal.[3]

Her Majesty's Government received notice of the equipment of the Shenandoah, and its attending circumstances, on the 12th November. It came in the form of a report from the Consul of Her Majesty at Teneriffe, and was accompanied by the captain of the Sea King, under arrest, and affidavits of witnesses detailing the facts.[4]

On the 18th Mr. Adams also communicated the same information to Earl Russell, with additional affidavits.[5]

The November mail from Europe, which arrived at Melbourne about the middle of January, carried there the news of her departure and her conversion into a vessel of war.[6]

After starting upon her cruise she "boarded at sea the galley Kebby Prince, from Cardiff, to the port of Bahia;" and in such act her commander opened the manifest of such "galley, breaking the seal of the Brazilian Consulate." For this offense His Majesty, the Emperor of Brazil, true to his principles of enforcing neutrality, as well as proclaiming it, promulgated an order in the official gazette at Rio Janeiro, on the 21st of December, prohibiting "the entrance into any port of the empire of said steamer, or of any other vessel commanded by the said Waddell."[7]

On the 25th of January, 1865, she arrived at Hobson's Bay, near Melbourne, and asked leave to coal and repair. Commander King, of Her Majesty's ship Bombay, then at that station, in reporting to Commodore Wiseman, under date of the 26th, said: Arrives at Melbourne.

The crew at present consists of only seventy men, though her proper complement is one hundred and forty. The men almost entirely are stated to be either English or Irish. Captain Waddell informed me that the Shenandoah is fast under canvas, and steams at the rate of thirteen knots; that she is fourteen months old, and was turned into a man-of-war on the ocean. He also told me that he had lately destroyed nine American vessels. It is suspected that the Shenandoah was lately called the Sea King, and that remains of the old letters are still perceptible; but of that I cannot speak from personal observation. * * * * From the paucity of her crew at present she cannot be very efficient for fighting purposes.[8]

The Governor of the Colony also, in reporting to Mr. Cardwell under

[1] Brit. App., vol. i, p. 667.
[2] Ibid., p. 667.
[3] Brit. App., vol. i, p. 696; Am. App., vol. vi, p. 698.
[4] Brit. App., vol. i, p. 477.
[5] Brit. App., vol. i, p. 484.
[6] Blanchard to Seward, Brit. App., vol. i, p. 584.
[7] Am. App., vol. vi, p. 588.
[8] Brit. App., vol. i, p. 499.

the same date, says: "Since closing my dispatches for the mail, a Confederate States steamer of war, called the Shenandoah, but supposed to have been formerly the Sea King, has anchored in Hobson's Bay."[1] She had then on board four hundred tons of coal remaining of her original supply on leaving London,[2] which was a full cargo of eight hundred and fifty tons.[3]

Permission to coal and make repairs granted.

Upon his arrival on the 25th, Lieutenant Waddell asked permission of the Governor to make the necessary repairs and supply himself with coals to enable him to get to sea as soon as possible; also to land prisoners.[4] He also, as he came into the bay, informed the tide-inspector that his object in visiting Port Phillip was to have some machinery repaired, and to procure coals and provisions.[5]

Thus the officers of Her Majesty's Government at Melbourne were at once, upon the arrival of the vessel, informed that the Sea King, which the November mail from Europe, received a few days before, advised them had left England with the intention of being converted into a vessel to carry on war against the commerce of the United States,[6] was then in port short-handed, asking permission to repair, provision, and coal. The request of Lieutenant Waddell was taken under consideration by the governor, who informed him that it should receive early attention and be replied to the next day.[7] On the next day the executive council was specially summoned by the Governor and under their advice the permission asked for was granted.

Protest of the consul.

Against these hospitalities the Consul of the United States protested on the 26th, and in so doing called the attention of the governor to the circumstances under which she had been armed and equipped, and of her identity with the English vessel Sea King. His protest was repeated on the 27th and 28th, but on the 30th his excellency replied that after advising with the law-officers of the Crown he had "come to the decision that, whatever may be the previous history of the Shenandoah, the Government of this Colony is bound to treat her as a ship of war belonging to a belligerent power." It now appears also that the advisers of his excellency tendered to him their opinion that it would not be expedient to call upon the lieutenant commanding to show his commission from the Government of the Confederate States authorizing him to take command of that vessel for warlike purposes.[8]

Against this decision the Consul most earnestly protested, and notified his excellency that "the United States Government will claim indemnity for the damages already done to its shipping by said vessel, and also which may hereafter be committed by said vessel * * upon the shipping of the United States of America, if allowed to depart from this port."[9]

Unfriendly conduct of the colony.

The commander of the Shenandoah having received his permission to repair, provision, and coal, had leave to take his vessel into the public docks, which were at the time controlled by private parties as lessees. The vessel and her officers were received with open arms by the people of Melbourne. The Governor of the Colony did not dine with or participate in the public or private hospitalities to the

[1] British App., vol. i, p. 500.
[2] Am. App., vol. vi, p. 698.
[3] Ibid., p. 630.
[4] Brit. Case, p. 144.
[5] Brit. App. Counter Case, vol. v, p. 68.
[6] Am. App., vol. vi, pp. 589 and 659.
[7] Brit. App., vol. i, p. 500.
[8] Brit. App., vol. i, p. 515; Brit. Case, p. 146.
[9] Brit. App., vol. i, p. 594.

officers of the vessel, but the mayor of Melbourne and its inhabitants did.[1] Crowds of people flocked to obtain sight of the "stranger," which bore the flag of insurgents that were supposed to have the sympathies of the English people at home; and the officers of the ship, "whose history was so brief, but so brilliant," could remember gratefully "the hospitalities of Melbourne and Ballarat.[2]

In short, at Melbourne, "in Australian waters, where a vessel of war belonging to the Confederate States" had never before been seen, the feeling which at home had permitted a Florida and an Alabama to escape, was found to exist in all its English vigor. The insurgent flag was hospitably received and courted there, as for nearly four years it had been in the ports of other British Colonies, and of the United Kingdom itself.

But the Consul of the United States having failed, upon the proof furnished by him, to induce the Governor of the Colony and his executive council to act as other nations had acted, and refuse the Shenandoah the hospitalities of the port, set himself about finding other testimony, and that which would be more effective.

The vessel came into the port short-handed, and "at present she could not be very efficient for fighting purposes."[3]

When she arrived at Liverpool, after her career was ended, her complement of officers and men, according to the report of Captain Paynter of Her Majesty's ship Donegal, was one hundred and thirty-three.[4] Her officers numbered twenty-six, leaving for her crew one hundred and seven. Temple, in his affidavit, makes the total number of enlistments on board the vessel, during her entire cruise, one hundred and eleven. Of these, two deserted at Melbourne and two died on the cruise, leaving the number of men on board when she arrived at Liverpool the same as stated by Captain Paynter. According to the same affidavit, the total crew on board, when the Laurel left her at Desertas, including those that originally came on the Sea King and those upon the Laurel, was nineteen. Twelve joined her from the crews of the captured vessels previous to her arrival at Melbourne; but two of these deserted there, leaving, as the aggregate of her crew on her arrival, and before any new recruitment, only twenty-nine men, and with the officers then on board, fifty-four. The officers which left Liverpool on the Laurel numbered twenty-four. One, Lieutenant Whittle, went by the Sea King, and one joined from a whaling-vessel captured in the Arctic Ocean, giving her, when she finished her cruise, twenty-six.[5]

Recruitment of men at Melbourne.

As has been seen, Commander King, when he visited her upon her arrival at Melbourne, reported her as having seventy men. Of course he got his information from the officers, who were not likely to give the number smaller than it actually was. It would not do to make it much too large, because "the paucity of the crew" was such as to attract the attention of the officer.[6]

The Consul at Melbourne, in writing to Mr. Adams on the 26th of January, the day after her arrival, mentioned the fact that her crew, all told, consisted of seventy-nine men.[7] But his knowledge at that time must have been derived from rumors in circulation; he had no means of verifying the statement himself. On the 10th February, Captain Payne, secretary of the naval board at Melbourne, who visited her at the request of the Governor, said in his report, "there appeared to me

[1] Brit. App., Counter Case, vol. v, p. 61.
[2] Am. App., vol. vi, p. 697.
[3] Brit. App., vol. i, p. 499.
[4] Ibid., p. 675.
[5] Brit. App., vol. i, p. 701.
[6] Ibid., p. 499.
[7] Ibid., p. 589; Brit. Case, p. 156.

to be about forty to fifty men on board, slouchy, dirty, and undisciplined. I noticed also a great number of officers, and could not help remarking that the number appeared out of all proportion to the few men I saw on board."[1]

Silvester, in his deposition, as printed among the documents submitted in evidence, says that when the Laurel left her the crew, including officers, consisted of twenty-three men.[2] This is undoubtedly a mistake. It may have been a clerical error in the original draught of the deposition or in transcribing.

It is clear, therefore, that when the Shenandoah reached Melbourne she was short-handed, and that an increase of her crew was absolutely necessary to make her an efficient vessel of war. Even after the additions she received at Melbourne she continued short-handed. Captain Nye, the master of the ship Abigail, captured on the 27th of May, says:

> The Shenandoah, at the time I was taken on board, had a full complement of officers, but was very much in want of seamen. * * * At two different times during the first ten days that I was on board, all hands, and my own crew besides, were obliged to be up all night working the ship in the ice. The officers and crew complained of being short-handed, and my own men were urged to join her.[3]

Thirty-eight men were shipped from the crews of vessels captured after leaving Melbourne, and seventeen of these were from the Abigail.[4] These made part of the one hundred and seven on board when the Shenandoah arrived at Liverpool.

As early as the 1st of February the Consul set about bringing the fact that she was short-handed to the knowledge of the government, and he commenced procuring affidavits, and employed his counsel.[5]

The colonial authorities informed of the contemplated recruitments, and do not prevent them.

On the 2d of February he left with the chief clerk of the law-office of the Crown, in the absence of the Attorney-General and the Minister of Justice, affidavits of three persons; on the next day he called in person, with his solicitor, upon the Crown Law-Officers; on the next day, the 4th, he handed in two other affidavits; and on Monday, which was the 6th, he and his solicitor called again, in pursuance to an appointment made, and produced seven additional affidavits.

In nearly every one of these affidavits, among the other important facts developed, is the one that during the entire cruise previous to her arrival at Melbourne, great efforts were made by the officers of the Shenandoah to increase their crew by the enlistment of men from the prisoners taken on the different prizes. For that purpose such as would not join were put in irons.[6]

At this interview the Consul was given to understand, in fact, as he said in his dispatch to Mr. Seward subsequently, the Law-Officers "seemed to admit that she would be liable to seizure and condemnation if found in British waters; but would not admit that she was liable to seizure here, unless she violated the neutrality proclamation while in this port, and if she did they would take immediate action against her."[7]

From this it appears that the same doctrine prevailed among the Law-

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[1] Brit. Case, p. 155.
[2] Brit. App., vol. i, p. 598.
[3] Am. App., vol. vii, p. 93.
[4] Temple's affidavit, Brit. App., vol. i, p. 702.
[5] Am. App., vol. vi, p. 590.
[6] See protest Captain Nichols, Brit. App., vol. i, p. 589; affidavit, Bruce, ibid., p. 594; Colby, ibid., p. 597; Silvester, ibid., p. 598; Jones, ibid., p. 599; Ford, ibid., p. 601; Brackett, ibid., p. 602; Bollin, ibid., p. 603; Sandall, ibid.; Scott, ibid., p. 604; Lindborg, ibid.
[7] Am. App., vol. vi, p. 520; Brit. App., vol. i, p. 585.

Officers of the Crown at Melbourne, which had permitted the escape of the Florida at Nassau.

Although that doctrine is now repudiated by Her Majesty's Government, it was known at the Foreign Office as early as the 16th of September, 1862, that the Florida had been released at Nassau upon that ground, and that ground alone. It was a doctrine that had a most important bearing upon the constantly recurring attempts at the evasion of the laws of Her Majesty by the insurgents; but it does not appear to have been considered of sufficient importance to justify instructions from Her Majesty's Home Government to any of the numerous Law-Officers of the Crown upon whom the responsibility of these prosecutions "in so great a measure rested."

The United States agree with Her Majesty's Government when it says, as it does in its Counter Case, that it should not be, and they hope it is not, in the power of Her Majesty's Government to instruct a judge, whether in the United Kingdom or in a colony or dependence of the Crown, how to decide a particular case or question. No judge in Her Majesty's dominions should submit to be so instructed; no community, however small, should tolerate it; and no minister, however powerful, should ever think of attempting it.[1]

But the United States cannot but think the Law-Officers of the Crown occupy a different position, and that when Her Majesty's Government sees so striking an error prevailing among those whose duty it is to conduct the judicial proceedings, by means of which international obligations are to be enforced, it is not only the right of the Government, but its imperative duty, to correct the error, and see to it that such important rights are not again "admitted" away, to the great injury of a nation with which Her Majesty was at peace. A judge whose duty it is to decide may not be instructed; but a mere agent whose duty it is to present a case for decision may be. If such an agent fails in his duty or errs in his opinion, and such error or such failure in duty is likely to be repeated by the same or other agents, it is neglect in a government if it fails to attempt, at least, to prevent the repetition, and if the repetition should affect other nations the government must answer for the consequences.

But accepting this doctrine of the Law-Officers for the time being, the Consul on the 9th of February forwarded to the Governor the affidavits which he had already presented to the Law-Officers; and on the 10th he sent the affidavit of John Williams, who swore that on the 6th February, when he left the ship, "there were fifteen or twenty men concealed in different parts of said ship, who came on board since said Shenandoah arrived in Hobson's Bay; and said men told me they came on board said Shenandoah to join ship. That I cooked for said concealed for several days before I left. That three other men, in the uniform of the crew of the said Shenandoah, are at work on board of said Shenandoah, two of them in the galley, and one of them in the engine room. That said three other men in uniform also joined said Shenandoah in this port. That I can point out all men who have joined said Shenandoah in this port." This was received by the Governor at 3.30 p. m. of the 10th, and he made an order that it be referred to the Attorney-General."[2]

On the same day Captain Payne, who had been instructed by the Governor to report upon the vessel, among other things, informed him that there appeared "to be a mystery about her fore-hold, for the fore-

[1] Brit. Counter Case, p. 77.

[2] Brit. App., Counter Case, vol. v, pp. 107. 108.

man of the patent slip, when asked to go down to that spot to measure her for the cradle, was informed he could not get to the skin at that place. The hatches were always kept on, and the foreman states that he was informed they had all their 'stuff' there."[1]

On the 13th February the following reports were forwarded to the "honorable the chief secretary" of the Colony:

Detective Kennedy reports, in reply to certain questions submitted to him for inquiry on the 11th instant:

First. That twenty men have been discharged from the Shenandoah since her arrival at this port.

Second. That Captain Waddell intends to ship forty hands here, who are to be taken on board during the night, and to sign articles when they are outside the Heads.

It is stated that the captain wishes, if possible, to ship foreign seamen only; and all Englishmen shipped here are to assume a foreign name.

McGrath, Finlay, and O'Brien, three Melbourne boarding-house keepers, are said to be employed in getting the requisite number of men, who are to receive £6 per month wages and £8 bounty, &c.

Peter Kerr, a shipwright, living in Railway Place, Sandridge, stated about a fortnight ago, in the hearing of several persons, that Captain Waddell offered him £17 per month to ship as carpenter. A waterman named McLaren, now at Sandridge, is either already enlisted or about to be so.

The detective has been unable, up to the present, to collect any reliable information as to whether ammunition, &c., has been put on board the Shenandoah at this port, or whether arrangements have been made with any person for that purpose.

(Urgent.) For the chief commissioner's information. C. H. Nicholson, superintendent.

Mr. Scott, resident clerk, has been informed, in fact, he overheard a person represented as an assistant purser state, that about sixty men engaged here were to be shipped on board an old vessel, believed to be the Eli Whitney, together with a quantity of ammunition, &c., about two or three days before the Shenandoah sails. The former vessel is to be cleared out for Portland or Warrnambool, but is to wait outside the Heads for the Shenandoah, to whom her cargo and passengers are to be transferred.

C. H. NICHOLSON,
Superintendent.[2]

After these reports, on the next day, there came to the Attorney-General of the Colony the following communication from Lieutenant Waddell, very significant when read in connection with the previous report from the police. "Be pleased to inform me if the Crown claims the sea to be British waters three miles from Port Philip Head lights, or from a straight line drawn from Point Lonsdale and Schanck."[3]

Upon the reception of this, the Attorney-General sent a note declining to give the information asked for. On presentation of the note to Lieutenant Waddell, he handed it "back to the messenger with the simple answer that it was not what he wanted, that it had better be taken back with his compliments."[4]

Their inefficient proceedings.

On the 13th of February, a warrant was issued by a magistrate for the arrest of one of the men charged to have been enlisted;[5] and it was at once placed in the hands of the superintendent of police for service. This officer went the same evening on board the vessel to execute his warrant, and on the next day made the following report:

I have the honor to inform you that, acting on your instructions, I proceeded last evening to the Confederate war-steamer Shenandoah, with a warrant for the arrest of a man known as Charley, stated to have illegally engaged himself on board the vessel. I asked for Captain Waddell, but was informed that he was not on board. I then asked for the officer in charge, saw him, and obtained permission to go on board. I told the officer my business, and requested that he would allow me to see the men on board, in order that I might execute my warrant. He refused to allow me. He then showed me the ship's articles and asked me to point out the name of the man, which I

[1] Brit. Case, p. 155.
[2] Brit. App., Counter Case, volv, p. 108.
[3] Brit. App., vol. i, p. 646.
[4] Brit. App., vol. i, p. 647.
[5] Brit. App., vol. i, p. 536

was unable to do. I showed him my warrant, which he looked over, and returning it to me he said, that is all right, but you shall not go over the ship. He told me I had better return when the captain was on board; but as he could not say at what hour he would probably return, I told him that I would see the captain the following day. This morning I went again to the Shenandoah, and after stating my business was allowed on board. I told Captain Waddell that I was informed he had persons on board who had joined his vessel here, and that, informations having been sworn to that effect, I had a warrant with me. He said, I pledge you my word of honor as an officer and a gentleman that I have not any one on board, nor have I engaged any one, nor will I while I am here. I said I understood that the persons I wanted were wearing the uniform of the Confederate States, and were working on board. This he distinctly denied. He offered to show me the ship's articles but I declined, and told him that I had seen them last evening. I then asked him to allow me to go over the ship, and see if the men I wanted were on board. This he refused to do. I said I must try to execute my warrant, even if I had to use force. He said he would use force to resist me, and that if he was overcome he would throw up his ship to the government here and go home and report the matter to his government. He said that he dare not allow me to search his ship; "it was more than his commission was worth, and that such a thing would not be attempted by the Government to a ship of war of another country." He said "it was only by courtesy that I was allowed on board," and that he considered "a great slight had been put upon him by sending me to the ship with a warrant." He said he thought that his "word should have been taken in preference to that of men who had probably deserted from the ship, and had been put up to annoy him by the American consul." He said that if I took one man, I might come afterwards and take fifteen or twenty, and that the American consul would perhaps lay an information against him as being a "buccaneer or pirate." He said he thought that he had been very badly treated here by the police refusing to assist him in arresting his deserters. Before leaving I asked him again if he refused to allow me to look for the man for whom I had a warrant in my hand. He replied yes, that he did refuse, and that he would fight his ship rather than allow it. I then left.[4]

On the day of its receipt this report was submitted by the Governor to the executive council. In pursuance of the advice of the council, the secretary of the commissioners of trade and customs addressed a letter to Lieutenant Waddell, appealing "to him to reconsider his determination," and informing him that pending such further information the permission to repair and take in supplies was suspended.[2] The answer to this letter was dispatched by Lieutenant Waddell at five minutes before ten o'clock on the evening of the 14th,[3] and in it he says:

I have to inform his excellency the governor that the execution of the warrant was not refused, as no such person as the one therein specified was on board; but permission to search this ship was refused. According to all the laws of nations, the deck of a vessel of war is considered to represent the majesty of the country whose flag she flies, and she is free from all executions, except for crimes actually committed on shore, when a demand must be made for the delivery of such person, and the execution of the warrant performed by the police of the ship. Our shipping articles have been shown to the superintendent of police, all strangers have been sent out of the ship, and two commissioned officers were ordered to search if any such had been left on board. They have reported to me that, after making a thorough search, they can find no person on board except those who entered this port as a part of her complement of men. I, therefore, as commander of this ship, representing my government in British waters, have to inform his excellency that there are no persons on board this ship, except those whose names are on my shipping articles, and that no one has been enlisted in the service of the Confederate States since my arrival in this port, nor have I in any way violated the neutrality of the port. And I, in the name of the Government of the Confederate States of America, hereby enter my solemn protest against any obstruction which may cause the detention of this ship in this port.[4]

At about 10 o'clock p. m. of that day, four men left the Shenahdoah in a boat pulled by two watermen.[5] They were arrested, and one of them was identified as the man for whose arrest the warrant was issued.

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[1] Brit. Case, p. 150.
[2] Brit. Case, p. 151.
[3] Brit. App., Counter Case, vol. v, p. 110.
[4] Brit. App., vol. i, p. 647.
[5] Brit. Case, p. 152; Brit. Counter Case, p. 96.

On the same 14th day of February the Consul forwarded to the Governor two other affidavits, in one of which, that of Hermann Wicke, the following statement is made:

Further proof of recruiting furnished the authorities.

That the rations in Hobson's Bay are served by the master-at-arms, (I believe named Reed,) who gives the rations to Quartermaster Vicking, and this latter brings the rations to the galley to be cooked by the cook, known by the name of "Charley;" that said cook Charley was not on board the Shenandoah on her arrival in the bay; he went on board since her arrival, and he told me he would join the ship as cook; that he dared not do it in the port, but that he would do it when proceeding outwards; that I also saw said cook take rations to a number of men who were concealed in the forecastle, who went on board since her arrival in Hobson's Bay. That on Saturday, 11th February, 1865, when working and cleaning the Shenandoah, three boys, who came on board the Shenandoah since her arrival in this port, assisted in painting between decks, whereas the number of men so concealed (as mentioned above) worked on deck; that the said men so concealed, in number about ten, received rations cooked in the same cooking apparatus and served in the same way as the regular crew on board; they eat out of the ship's plates in the forecastle, such as were used by the prisoners while on the cruise; that they sleep on board, one part in the forecastle, the other part between decks. That the cook Charley and another, which I could identify if seeing him again, wore sometimes the ship's uniform.[2]

And in the other, that of F. C. Behucke, the following appears:

That before I left the said steamship I saw about ten men concealed in said Shenandoah. Some of said men told me they came on board to join. That several of the said men were at work with me on Saturday last with the knowledge of the officers; that one of the said men told me that he could not sign articles in this port, but was going to do so as soon as he got outside; that one man in the galley, who came on board at this port, wears the uniform and performs his duty in the said uniform; that said man in the galley has been wearing the uniform for about eight or ten days; that I heard said man in the galley called Charley; that all the said men who came on board since we arrived in Melbourne have been rationed from the said ship Shenandoah; that I have seen the master-at-arms serve out their provisions to Vicking; that after the provisions are cooked I have seen Quartermaster Vicking take it to them from the galley while concealed in the forecastle.[2]

All these communications were, on the 15th of February, submitted by the Governor to his executive council.[3]

From this it appears that on the 15th of February the Governor and his council knew from the statement of an officer in command of one of Her Majesty's ships that the ship, from the "paucity of her crew," was not in condition for a ship of war; that one witness, who was still within the reach of the judicial process of the Colony, had stated, under oath, that there were fifteen or twenty men concealed in different parts of the ship who came on board to join; that an officer of the Government, whom the Governor had sent on board to examine the vessel, reported that "there appeared to be a mystery in the fore-hold" and no one had been admitted there; that the police officers of the Government, who had been directed to ascertain the facts, had reported that it was the intention of the commander to ship forty hands, and that some men had been engaged, and arrangements had been made for the engagement of others; that upon an order being issued upon the sworn testimony of a complainant for the arrest of a man who had enlisted to serve upon this vessel, the officer whose duty it was to make the arrest reported that he had been probibited by an inferior officer of the ship and by the officer in command, each acting separately, from serving the process on board the vessel, the principal officer in command declaring upon his honor as an officer and a gentleman there was no such person on board; that upon an "appeal" to the commander for a reconsideration of his decision he replied that no such person was on board at the time the request for permission to serve the process was made, when the falsehood of his statement was proven by the arrest of the man, who left the vessel at

[1] Am. App., vol. vi, p. 626.
[2] Am. App., vol. vi, p. 627.
[3] Brit. App., vol. i, p. 526.

or about the time the letter was being written, and which was more than twenty-four hours after the attempt to serve the process was made;[1] and that, after this statement of the commander, the Consul of the United States produced the affidavits of the other persons, who declared positively that there was a large number of men still concealed on board to enlist when the ship got out of port.

The authorities parley with the commander of the Shenandoah in place of acting.

Notwithstanding all this, however, upon the assurance of the commander, made after after the arrest of the four persons who escaped, "that there were no persons on board his ship whose names were not on the shipping articles," and that no one had enlisted "in the service of the Confederate States since his arrival in port," the order suspending permission to repair and take on supplies was unconditionally rescinded, and the ship released from the surveillance of the police who had been placed around her. No promise was exacted for the future; no officer was placed on board; no watch maintained, but the full and untrammeled hospitality of the port was granted to a ship whose commander had not scrupled to "state upon his honor" that which the Governor knew to be false.

After the release was ordered, and notice thereof given to Lieutenant Waddell, his excellency caused to be addressed to him a letter as follows:

I am directed by his excellency the Governor to further acknowledge your communi cations of the 13th and 14th instant, in which, alleging that the vessel under your command had been seized, you ask whether the seizure be known to his excellency the governor, and if it meets his approval.

I am to inform you, in reply, that this Government has not directed or authorized the seizure of the Shenandoah.

The instructions to the police were to see that none of Her Majesty's subjects in this Colony rendered any aid or assistance to, or performed any work in respect of, your vessel, during the period of the suspension of the permission which was granted to you to repair and take in supplies pending your reply to my letter of yesterday's date in regard to a British subject being on board your vessel, and having entered the service of the Confederate States, in violation of the British statute, known as the foreign-enlistment act, and of the instructions issued by the Governor for the maintenance of the neutrality by Her Majesty's subjects. In addition to evidence previously in possession of this government, it has been reported by the police that about ten o'clock last night four men, who had been in concealment on board the Shenandoah, left the ship, and were arrested immediately after so leaving by the water police.

It appears from the statements of these men that they were on board your vessel both on Monday and Tuesday, the 13th and 14th instant, when their presence was denied by the commanding officer in charge, and by yourself subsequently, when you declared that there were "no persons on board this ship, except those whose names are on our shipping articles." This assertion must necessarily have been made by you without having ascertained for yourself by a search that such men were not on board, while at the same time you refused permission to the officer charged with the execution of the warrant to carry it into effect.

Referring to that portion of your communication of the 14th instant in which you inform his excellency the Governor, "that the exeution of the warrant was not refused, as no such person as the one specified therein was on board," I am in a position to state that one of the four men previously alluded to is ascertained to be the person named in the warrant.

I am also to observe, that while at the moment of the dispatch of your letter it may be true that these men were not on board the Shenandoah, it is beyond question that they were on board at the time it was indited, your letter having been dispatched at five minutes before ten o'clock.

It thus appears plain, as a matter of fact, that the foreign-enlistment act was in course of being evaded. Nevertheless, inasmuch as the only person for whose arrest a warrant was issued has been secured, and as you are now in a position to say, as commanding officer of the ship, and in behalf of your Government, whose faith is pledged by the assurance, that there are "no persons on board this ship except those whose names are on our shipping articles, and that no one has been enlisted in the service of the Confederate States since my arrival in this port," his excellency the Governor has been pleased to revoke the directions issued yesterday, suspending permission to

[1] Speech of McCullock in the colonial assembly, Am. App., vol. vi, 666.

British subjects to aid and assist you in effecting the necessary repairs, and taking in supplies.

I am to add, it is expected that you will exercise every dispatch, so as to insure your departure by the day named in your first letter of yesterday, viz, Sunday next.[1]

To this the lieutenant commanding replied on the 16th, and in so doing took occasion to say:

In conclusion, sir, allow me to inform you that I consider the tone of your letter remarkably disrespectful and insulting to the Government I have the honor to represent, and that I shall take an early opportunity of forwarding it to the Richmond Government.[2]

But he accepted the privileges granted. The disrespect and insult consisted, as the Arbitrators will readily perceive, in intimating somewhat distinctly to the commander, that the Governor accepted statements made "upon honor," which he knew to be false in spirit, if not in letter.

On the 16th of February an examination was had of the parties arrested while leaving the ship, before one of Her Majesty's justices of the peace for the Colony. The witnesses, whose affidavits had been taken and presented to the Governor, were examined orally in court. Every fact stated in the affidavits was proven, and the accused were identified as the parties who were on the ship. One of them (Charley) was not only on the ship, but in the uniform of the ship performing the duties for which he had enlisted, or at least had agreed to enlist. Upon this testimony the persons arrested were all, on the 17th, committed for trial, and two were subsequently convicted.[3] But one was afterward discharged by the Attorney-General on account of his youth, and another for want of proof as to his nativity. The next day the officers of the vessel appealed to the public through the newspapers. They there stated, "upon their honor," to protect themselves, and secure the escape and increased efficiency of their ship, what they dared not state, "under oath," to protect the ignorant men whom they allowed to suffer for their own crime.[4]

Immediately after the order permitting the repairs and supplies to be continued was made known, the Consul addressed another communication to the Governor, which he closed by saying: "I trust, therefore, that upon further reflection, your excellency will reconsider your decision regarding this vessel, against which I have felt constrained to protest so earnestly."[5]

This communication must have come into the hands of the Governor not long after he had received the somewhat pointed letter of the commander of the vessel; but neither the representations of the Consul, the result of the examination of the men who had been persuaded by the real offenders to become criminals, the insolence of the commander of the vessel, nor anything else, could induce the authorities composing Her Majesty's Government at this Colony even to put the vessel under further surveillance.

Further information of contemplated recruitments.

On the 16th of February, the consul placed in the hands of the Attorney-General a further affidavit of Michael Cashmore, a citizen of Melbourne, stating that he had, on the 2d of February, seen on the Shenandoah a man in the uniform of the "ship, who was sitting with the other sailors eating soup," and who told him he had joined the ship that morning; and also an affidavit from the captain of a vessel in the port in which it was stated that fourteen

[1] Brit. App., Counter Case, vol. v, p. 112.
[2] Ibid., p. 113.
[3] Brit. App., vol. i, p. 596.
[4] Ibid., p. 546.
[5] Ibid., p. 614.

days before he had gone on board the ship and inquired of the commanding officer if he had any chronometers for sale; that he was directed to a person in the uniform of an officer; that he had made a selection from five or six chronometers handed him by the officer and bought and paid for one which he described.[1] These affidavits were procured and placed in the hands of the Law-Officer of the Crown just after the vessel had been launched from the slip.

On the 16th of February, Lieutenant Waddell informed the governor, that every dispatch was being used by him to get the Shenandoah to sea at the earliest possible moment;[2] and on the 17th, it was reported by the tide-inspector that she had taken on coals during the night, and was reshipping stores from a lighter.[3] It must have been apparent to all she would remain in port but a short time longer.

Refusal of the colonial authorities to act.

At 5 o'clock in the afternoon of the 17th, the Consul received other information to the effect that men were being enlisted to increase the crew. He went at once with his new witness, Andrew Forbes, to the Crown Solicitor, by whom he was sent to some of the "plenty of magistrates;" then he went to the office of the chief commissioner of police, who was not in; then to the Attorney-General, who wanted an affidavit taken; then to the office of the detective police, but the chief of that office must have a warrant before he could act, and advised him to go to the police justice for that purpose; then to the police justice, who could not take the responsibility of granting a warrant upon the evidence of one man alone, but advised him to go to a magistrate at Williamstown, about four miles distant, who, perhaps, might have corroborative testimony. It was, by this time, half-past seven o'clock in the evening. At this hour the Consul took the affidavit of the witness, which he sent by private hand to the attorney-general, and started himself for Williamstown. The witness, however, being afraid of personal harm, refused to go with him, and the affidavit did not reach the attorney-general on account of the lateness of the hour.[4] The Consul did, however, send a messenger to the water-police, at Williamstown, who reported to them the shipping of the men, but they said they were powerless to interfere without directions from the head authorities at Melbourne.[5] In view of this state of facts the United States believe the Arbitrators will not agree with Her Majesty's Government when it says, as it does in the Counter Case, on page 97, that the Consul was "certainly more justly chargeable with a want of due diligence than those" to whom he applied for assistance.

The United States in this connection also ask the attention of the Arbitrators to the following statement in the Counter Case, presented by Her Majesty, on page 98:

> Such, as far as is known to Her Majesty's Government, is all the information which the authorities of Melbourne were able to obtain as to the alleged shipment of men from the Colony on board the Shenandoah. It was furnished, for the most part, to the police by the boatmen who had been employed in putting the men on board, on the understanding that they should not themselves suffer on account of what had been done.

But on the 16th, more than twenty-four hours before she left port, it was demonstrated there was evidence enough to convict four men who had enlisted before the vessel had sailed, and before she went to the docks. That information was not obtained from boatmen. Everything transpired under the eyes of the police themselves, and the conviction followed from their testimony, connected with that which had

[1] Brit. App., vol. i, p. 615.
[2] Ibid., p. 621.
[3] Ibid, p. 532.
[4] Lord Blanchard, Brit. App., vol. i, p. 617.
[5] Affidavit of Robbins, Am. App., Counter Case, p. 115.

been furnished by the Consul. It was what they knew before the vessel left port which should have compelled them to act, not what came to them after. The United States have never asked for the conviction of the boatmen. What they wanted was the detention of the vessel, or, at least, the adoption of such measures as would prevent the augmentation of her warlike force.

Large recruitments of men; departure from Melbourne.

The Shenandoah left her anchorage early on the morning of the 18th and proceeded to sea unmolested. The "guns were all loaded before the vessel went outside of the Heads."[1] The chief commissioner of police says, on the 26th October, 1871, that "no visitors were allowed on board the Shenandoah under any pretense for three days before she sailed, and, in the absence of any of Her Majesty's ships in our waters at the time, the efforts of the water-police were necessarily of little avail."[2] The same officer says, in the same report: "Had the Shenandoah been afloat in the bay at the time, I am convinced that any attempts on the part of the police to search her, or to execute warrants for the apprehension of persons illegally enlisted, would have been violently resisted." If this was understood at the time, the United States are at a loss to know why it was she was permitted to get afloat until her officers had allowed their vessel to come under the surveillance of the Government, or until some means had been devised by which a fresh violation of the neutrality of the waters might be prevented. Her Majesty's ship Bombay was in port when the Shenandoah arrived, and the United States can hardly believe she had been permitted to leave the harbor entirely unprotected while so troublesome a visitor remained. At so important a station there must have been some vessel of Her Majesty's powerful Navy that could be called upon by the Governor of the Colony for assistance in case it became necessary. At any rate the Shenandoah could have been held upon the dock until a ship of war was found to watch her if the authorities had been so disposed.

As soon as the Shenandoah got outside of the neutral waters an addition was found to the complement of her men. They may not have been added to her crew in form, by actual enlistment, but they were recruited; and with the men on board the enlistment was easily accomplished. In this way forty-two men were added to the crew, as will appear by the affidavit of Temple, in which names are given.[3] Among these names the Arbitrators will find, as master-at-arms, "Charles McLaren." His name also appears in the report of the chief detective at Sandridge, made on the 13th of February, where it is said: "A waterman named McLaren, now at Sandridge, is either already enlisted or about to be so."[4] It also is found in the report of the same detective on the 21st, as McLaren, "who stated openly a short time back to a waterman named Sawdy and others, that he was about to ship on the Shenandoah."[5] They will also find the names of Thomas Evans, Robert Dunning, and William Green, which also appear in the affidavit of Forbes,[6] the witness who went with the consul on the 17th when he endeavored to obtain some action by the officers.

As soon as the vessel had escaped, it was easy for the authorities to satisfy themselves that large additions had been made to the crew.

The 18th, the day on which she sailed, was Saturday. The papers published on Monday morning all make mention of the increase of her crew. The Herald has the following notice:

[1] Brit. App. Counter Case, vol. v, p. 120.
[2] Ibid., p. 121.
[3] Brit. App., vol. i, pp. 701, 702.
[4] Brit. App. Counter Case, vol. v, p. 108.
[5] Ibid., p. 117.
[6] Brit. App., vol. i, p. 616.

The Confederate cruiser Shenandoah left Hobson's Bay at about 6 a. m. on Saturday, and was seen during the afternoon outside the Heads by the schooners Sir Isaac Newton and Zephyr. She steamed up to the former and hoisted an English ensign, which on being answered with a like flag she stood off again; when the Zephyr saw her at a later hour of the day she was hove to off Cape Schanck. Several rumors are afloat that the Shenandoah shipped or received on board somewhere about eighty men just prior to leaving. We have since been informed that she took away a large number, but not equal to that above stated.[1]

In the Argus it was said:

It is not to be denied, however, that during Friday night a large number of men found their way on board the Shenandoah, and did not return on shore again.[2]

Another paper said:

There is no doubt that she has taken away with her several men from this Colony; report says eighty, but that is probably an exaggeration. The neglect of the Attorney-General in not replying to Captain Waddell's question as to the extent of the neutral limit, has apparently absolved that commander from responsibility so far as carrying on hostile operations outside Fort Philip Heads is concerned, for, according to our shipping report, the Shenandoah steamed up to the schooner Sir Isaac Newton, evidently with the intention of overhauling her had she happened to be a Yankee vessel.[3]

And the Age said:

The Shenandoah left Hobson's Bay at 6 o'clock on Saturday morning. It is currently reported that she shipped some eighty men just prior to leaving. At a late hour on Saturday she was hove to off Cape Schanck. The police on Saturday received the following information relative to an attempt made to enlist men for the confederate service on board the confederate steamer Shenandoah. About half past 4 o'clock on Saturday afternoon, a man who gave his name and address as George Kennedy, 125 Flinders Lane, east, called at the police office in Russell street, and stated that, having seen an advertisement in the Argus, he called on the advertiser, Powell, with whom was another man whose name he did not know. He remained in their company for several hours, during which time they supplied him with drink, and endeavored by every kind of persuasion to induce him to join the confederate service on board the Shenandoah, for which purpose they also conducted him to the wharf, and desisted from their efforts only when he openly stated his intention of reporting the matter to the authorities. Kennedy further stated that when the men were using their endeavors to get him to join the Shenandoah there were several other persons present who accepted their offers, and whom he now believes to be on board that vessel.[4]

On the 21st, the senior constable of the water-police reported "that at about 9 o'clock p. m. on the 17th instant, [the evening before she sailed,] when on duty at the railway pier, Sandridge, he observed three watermen's boats leave that pier, and pull toward the Confederate States steamer Shenandoah, each boat containing about six passengers; observed likewise a person who the constable believed to be an officer of the ship in plain clothes, superintending the embarkation of the passengers; saw the same boats returning in about half an hour afterward, midway between the Shenandoah and the pier, with only one man in each of them; on returning to the pier at about midnight, was informed by the constable on duty there (Knox) that during the absence of the police boat, three or four boats had left the pier for the Shenandoah, containing in all about twenty passengers. Have made inquiries relative to the persons conveyed on board, and find that the parties named in the margin were seen on board at one o'clock in the morning of the 18th instant."[5]

George W. Robbins also stated to the police that "he passed across the bay on Friday night last, with a message from the American Consul to the police, to the effect that the Shenandoah was shipping men on board. On his way he saw a boat pulled by Jack Riley and a man named Muir; they had about twelve men in a boat. On his return,

[1] Am. App., vol. vi, p. 683.
[2] Ibid., p. 684.
[3] Ibid.
[4] Ibid., p. 685.
[5] Brit. App. Counter Case, vol. v, p. 119.

Riley and Muir being alone, pulled up from the Shenandoah, and hailed Robbins. Robbins did not reply."[1] The report of this last statement was made on the 22d.

But the United States ask the attention of the Tribunal to another fact connected with the treatment of the Shenandoah at Melbourne.

She was a "full-rigged ship of superior build, and with good winds she was a fast sailer, but with light breezes she was only ordinary. She also had steam-power auxiliary, with a propeller that could be used at pleasure, and which, when not in use, could be hoisted up, so as not to interfere with her sailing. During the days before named, she sailed more than two thousand miles, and only used her steam-power twice, once in going through the straits and again in clearing Behring's Island."[2] She only used steam-power two days during the thirty preceding her arrival at Melbourne.[3] Steam was rarely used except in making captures.

Her repairs were only necessary to make her steam-power effective.

Excessive repairs at Melbourne.

The board of inspectors appointed by the Governor to ascertain what repairs were needed, reported that she was not "in a fit state to proceed to sea as a steamship;" and all the particular repairs specified by them, and by the firm employed by Captain Waddell, related to her steam-power alone. Not a word is said of any repairs to her hull, and it does not appear that any were made except calking.

As has been seen, when she arrived she had on board four hundred

Coaling then excessive.

tons of coal.[4] This fact was made known to Governor Darling by the United States Consul on the 17th of February.[5] But he must have been made acquainted with the same fact from other sources. Captain Waddell asked leave to land his "surplus stores."[6]

On the 7th the tide inspector reported that she "on Monday was lightening, preparatory to being taken on the slip, by discharging stores and coals into the lighters near the breakwater."[7] On the same day the harbor-master reported "the crew and a party of men from the shore are now employed in discharging coals and stores into lighters. * * I have been given to understand, if she be sufficiently lightened, and weather permitting, she will be taken into the slip to-morrow afternoon."[8] Again, on the 8th, the tide inspector reported, "The Shenandoah continued to discharge stores into lighters yesterday, but little progress was made, owing to the boisterous state of the weather."[9] And on the 9th, the harbor-master reported "that the persons in charge of the patent slip, on placing the Shenandoah on the cradle yesterday, found she was drawing too much water to admit of the vessel being taken up with safety. The crew and men from the shore are lightening her abaft, preparatory to another trial to get her up to-day at high water."[10] It will be borne in mind that she was a vessel of war without cargo, except coal. She was lightened, therefore, by taking out coals and supplies only.

On the 17th the Consul protested to the Governor against her being permitted to take in coals, adding, "I cannot believe Your Excellency is aware of the large amount of coal now being furnished said vessel;"[11] but the Governor "acquainted" him in reply, on the same day, that a ship of war of either belligerent is, under Her Majesty's instructions, allowed

[1] Brit. App. Counter Case, vol. v, p. 120.
[2] Affidavit of Captain Nye, Am. App., vol. vii, p. 92.
[3] Affidavit of W. G. Nichols, Am. App., vol. vii, p. 102.
[4] Am. App., vol. vi, p. 698.
[5] Brit. App., vol. i, p. 614.
[6] Ibid., p. 520.
[7] Ibid., p. 529.
[8] Brit. App., vol. i, p. 530.
[9] Ibid.
[10] Ibid.
[11] Ibid., p. 615.

to take in coal sufficient to carry such vessel to the nearest port of her own country or to some nearer destination."[1]

Thereupon, when the vessel was launched from the slip, she was hauled alongside the John Frazer, and took in three hundred tons of coal, which, with the four hundred she already had on board, gave an ample supply for the contemplated cruise.[2] It is now said by the collector of customs that "two hundred and fifty tons of coals were transshipped to her from the John Frazer."[3] It matters but little which of these amounts was actually taken, for, after a cruise of nine months and her destructive work among the whaling fleet in the Arctic seas, she arrived, on the 6th of November, at Liverpool, with one hundred and thirty tons remaining on board, according to the report of Captain Paynter, of Her Majesty's ship Donegal, to the Comptroller General of the Coast-guard.[4]

Notwithstanding the protest of the Consul, no account seems to have been required of the actual amount on hand, and from all that appears an unlimited permit was granted.

She was also permitted to take on board supplies for her cruise. The extent of these supplies does not appear.

On the 30th of January the Commissioner of Trade and Customs informed Lieutenant Waddell that "it will be necessary that a list of the supplies required for the immediate use of your vessel * * * should be sent in for the guidance of His Excellency."[5]

On the same day Lieutenant Waddell replied, "I have to state the immediate supplies required for the officers and crew under my command consist of fresh meat, vegetables, and bread daily; and that the sea supplies required will be brandy, rum, champagne, port, sherry, beer, porter, molasses, lime-juice, and some light materials for summer wear for my men, &c."[6]

It will be noticed that the quantities required are not stated; but on the next day the commander was notified that "permission is conceded for you to ship on board the Shenandoah, in such quantities as may be reasonably necessary, the provision and supplies enumerated in your communication under reply."[7]

If any further list was furnished, Her Majesty's Government has not seen fit to present it for the consideration of the Arbitrators.

The permit for general supplies appears, therefore, to have been as unlimited as that for coal.

Without these additions to her steam-power, crew, and supplies, she never could have accomplished the objects of her cruise. Although "a fast sailer in a strong wind, with a light breeze, she could not have outsailed the average of the whalers."[8] It is the firm opinion of Captains Nye, Hathaway, Winslow, Wood, and Baker that if she had not used her steam-power, she could never have captured the larger portion of the whaling fleet. She waited for a calm before attacking the whaling vessels, in order to prevent their escaping into the ice, and then made chase under steam.[9] And she could not have been safely handled in the Arctic seas if she had not obtained the additions to her crew at Melbourne. Even with these additions it was often necessary, as has been seen, to call on the prisoners to assist in working the ship.

The United States believe that after this statement of the occurrences

[1] Brit. App., vol. i, p. 617.
[2] Am. App., vol. vi, p. 698.
[3] Brit. App. Counter Case, vol. v, p. 85.
[4] Brit. App., vol. i, p. 674.
[5] Ibid., p. 640.
[6] Brit. App., vol. i, p. 517.
[7] Ibid., p. 641.
[8] Am. App., vol. vii, p. 97.
[9] Affidavits collected in Am. App., vol. vii, pp. 92 *et seq.*

at Melbourne, the Arbitrators will be surprised to find in a report of the Governor of the Colony to the Home Government, detailing the facts substantially as they are now given, the following passage:

I will not close my report of these transactions without assuring you that nothing could be further from my intention or that of my advisers than that the letter of the Commissioner of Trade and Customs of the 15th instant should be justly open to the charge of being disrespectful and insulting to the Government at Richmond. A clear recapitulation of the facts appeared to be expedient, if not necessary, for reasons which I have already stated; while the reference to that Government was a direct and natural consequence of the declaration in Lieutenant Waddell's letter of the 14th instant, then under reply, that he had written as commander of the ship representing his Government in British waters. Nor can I omit to observe that it would have been more consistent with the representative character in which Lieutenant Waddell thus declared himself, if, possessing, as he did throughout, ample power and means to ascertain that his ship had not become a place of concealment for British subjects seeking to violate or evade the law, he had employed that power and those means more effectively before committing himself to a solemn assertion, which eventually proved incorrect, and if, upon the discovery that these men were on board his ship,(assuming that discovery to have been made as he affirms it was after he had dispatched his letter of the 14th,) he had immediately apprised the Government of the mistake he had committed, instead of leaving it to be brought to light by the apprehension of the culprits themselves, and through the medium of a police examination.[1]

In less than sixty days after this report was written, and before any advices of what had been done could have reached Richmond, there was no "Government" there to be insulted, or to which representations could be made. The armies of the insurgents had surrendered, and those who had administered the Government were fugitives.

Only ten days before the date of that report, and after it was apparent to all that the struggle of the insurgents was nearly at an end, Her Majesty's Secretary of State for Foreign Affairs addressed the first remonstrance of his Government to the agents of the insurgents, and after stating that the "unwarrantable practice of building ships in this country to be used as vessels of war against a State with which Her Majesty is at peace still continues," says, "Now, it is very possible that by such shifts and stratagems the penalties of the existing laws of his country, nay, of any law that could be enacted, may be evaded; but the offense thus offered to Her Majesty's authority and dignity by the *de facto* rulers of the Confederate States, whom Her Majesty acknowledges as belligerents, and whose agents in the United Kingdom enjoy the benefit of our hospitality in quiet security, remains the same. It is a proceeding totally unjustifiable and manifestly offensive to the British Crown."[2]

It is a source of pleasure to the United States to learn that at last Her Majesty's Government did realize that the practices of the agents of the insurgents, which had been continued for so many years, were "manifestly offensive." It would have been more gratifying, however, if this manifestation had been noticed at a somewhat earlier date.

The Consul of the United States, in reporting the facts to his Government on the same day that the Governor reported to the Government of Her Majesty, uses the following language:

What motives may have prompted the authorities, with evidence in their possession as to the shipment of large numbers of persons on board said vessel, substantiated by the capture and commitment of some escaping from said ship, to allow the said vessel to continue to enjoy the privileges of neutrality in coaling, provisioning, and departing, with the affidavits and information lodged and not fully satisfied, I am at a loss to conceive. Was it not shown and proved that the neutrality was violated? And yet she was allowed her own way unmolested, thus enabling her to renew her violations of neutrality on a larger scale. There are eyes that do not see and ears that do not hear, and I fear that this port is endowed with such a portion of them as may be required to

[1] Brit. App., vol. i, p. 509.

[2] Am. App., vol. i, p. 631.

suit the occasion; for in what other way can my unsuccessful attempts to obtain the assistance of the authorities on the evening of the 17th instant be explained?[1]

The United States believe the Arbitrators will agree with the Consul in all that he has said.

Contrast between the course of Brazilian and of British authorities.

And here again the United States must ask the Arbitrators to contrast the conduct of Her Majesty's Government with that of His Majesty the Emperor of Brazil, who, as early as June 23d, 1863, upon much less provocation from these same belligerent insurgents, caused, among others, the following salutary rules to be promulgated for the guidance of the presidents of his several provinces:

6. Not to admit in the ports of the Empire the belligerents which may once have violated neutrality.

7. To cause to retire immediately from the maritime territory of the Empire, without furnishing them with any supplies whatever, the vessels which attempt to violate neutrality.

8. Finally, to make use of force, or in default, or by the insufficiency of the same, to protest solemnly and energetically against the belligerent, who, being warned and intimated, does not desist from violating the neutrality of the Empire.[2]

From Melbourne the Shenandoah made her way to the Island of Ascension, where, about the 4th of March, she destroyed four whaling vessels at anchor in the harbor. One of these vessels was from Honolulu, under the Honolulu flag, and commanded by a citizen of Honolulu. She remained at this island until about the 14th of March, and then cruised for nearly a month off the coast of Japan. The latter part of May she arrived in the Ochkotsk sea, where, on the 27th of May, she captured and destroyed the whaling ship Abigail, Captain Nye. She then sailed for Cape Thaddeus, a place much frequented by whaling ships, and arrived there about the 20th of June. Between that time and the 28th she captured twenty-four whaling vessels with their cargoes and outfit, and destroyed all except one, the largest number having been taken on the 28th. The United States believe the Arbitrators will find from the testimony of Captain Nye, Captain Hathaway, and W. H. Temple,[3] that most, if not all of these captures were made after Lieutenant Waddell had received news that the war had ended.

It is true it is said in the British Case, "that the commander of the Shenandoah positively affirmed that he had, on receiving intelligence of the downfall of the Government by which he was commissioned, desisted instantly from further acts of war,"[4] but it must be borne in mind that the same commander had previously made some "positive" statements at Melbourne which were afterwards found by Her Majesty's officers there not to have been in all respects true, and under these circumstances the United States believe that, if it becomes material, the Arbitrators will give more credence to the affidavits of the intelligent captains than to the assertions of the late commander. Although the testimony of Temple was severely criticised by the attorney of the commander at the time it was presented, all his statements, material to this question, have been fully sustained by the testimony of the other witnesses obtained since that time.

The insurrection came to an end in the month of April, 1865. On the 20th of June, Mr. Mason, one of the agents of the insurgents in London, addressed a note to Earl Russell in which he said:

It being considered important and right, in the present condition of the Confederate States of America, to arrest further hostile proceedings at sea in the war against the United States, those having authority to do so in Europe desire as speedily as practicable to communicate with the Shenandoah, the only remaining Confederate ship in commission, in order to terminate her cruise. Having no means of doing this in the

[1] Am. App., vol. vi, p. 595.
[2] Brit. App., vol. i, p. 295.
[3] Am. App., vol. vii, pp. 94, 95. Brit. App., vol. i, p. 693.
[4] Brit. Case, p. 157.

distant seas where that ship is presumed now to be, I venture to inquire of your lordship whether it will be agreeable to the Government of Her Majesty to allow this to be done through the British consuls at ports where the ship may be expected.[1]

Mr. Mason inclosed an "order" from Bullock, written at Liverpool, and addressed to Lieutenant Waddell, in which the following appears:

I have discussed the above circumstances fully with the Hon. J. M. Mason, the diplomatic representative of the Confederate States in England, and in accordance with his opinion and advice I hereby direct you to desist from any further destruction of United States property upon the high seas, and from all offensive operations against the citizens of that country.[2]

This order of Bullock was sent through Earl Russell to the consuls of Her Majesty at the points where it was expected the Shenandoah might appear.

Shenandoah at Liverpool.

On the 6th of November she again arrived at Liverpool, and her officers and men were landed there and discharged.

[1] Brit. App., vol. i, p. 653.

[2] Ibid.

X.—THE SUMTER, THE NASHVILLE, THE RETRIBUTION, THE TALLAHASSEE, AND THE CHICKAMAUGA.

The attention of the Arbitrators has thus far been directed, in the progress of this investigation of facts, to vessels which left Great Britain to receive their armament, and which were afterward, without having been engaged in any other service, actually armed for war.

The United States claim, however, that Great Britain failed to fulfill its duties toward them in respect to certain other vessels, to wit, the Sumter, Nashville, Retribution, Chickamauga, and Tallahassee. The facts upon which a claim is predicated for compensation on account of the acts committed by these vessels have already been stated in the Case which the United States have had the honor to present for the consideration of the Tribunal. Her Majesty's Government has, however, in its Case and Counter Case, submitted some new evidence which makes it proper for the United States to present in this argument, as briefly as is possible, a summary of the material facts in respect to these vessels as they now appear from the evidence and allegations submitted by both the parties.

THE SUMTER.

This vessel was originally in the merchant service of the United States, and, at the outbreak of the rebellion, was employed as a packet between New Orleans and Havana. The Sumter.
Soon after the blockade of the port of New Orleans, she was fitted and armed for a vessel of war, and, having escaped on the 30th of June, 1861, through the blockade at the mouth of the Mississippi River, appeared, on the 6th of July, at the port of Cienfuegos, in the island of Cuba, with six prizes which she had captured on her voyage thither.[1] The prizes were detained in port upon the order of the Captain-General of the island, and subsequently, on the 28th of the same month, "unconditionally" released "in consequence of investigations made by the authorities of Cienfuegos concerning their capture."[2] The Sumter, during her stay, was permitted by the local authorities at the port to take coal and water.[3] No application was made to the Governor-General for that purpose.[4] She went to sea in the evening of the 7th of July,[5] having remained in port about twenty-four hours.

On the 17th of July she arrived at Curaçao, in Dutch Guiana, where she was permitted to supply herself with coal and provisions.[6] She next appeared at Puerto Cabello, in the republic of Venezuela, on the 26th of July, with a prize, but being ordered to "take her departure within four and twenty hours," left, without coaling, at daylight on the 27th,[7] and arrived at a British port in the At Curaçao.

[1] Brit. App., Counter Case, vol. vi, p. 101.
[2] Ibid., p. 108.
[3] Ibid., p. 104.
[4] Ibid., p. 105.
[5] Ibid., p. 104.
[6] Ibid., p. 69.
[7] Cruise of Alabama and Sumter, p. 27.

island of Trinidad, on the 30th. Here she was "supplied with a new main yard, eighty tons of coal and provisions," and sailed in the evening of the 5th of August.[1] She next appeared at Paramaribo, in Dutch Guiana, on the 19th of August, and purchased and received coals without objection on the part of the authorities. Remaining at this port until the 31st,[2] she appeared at the Brazilian port of Maranham, on the 6th of September, "to coal and procure supplies."[3]

At Trinidad.

From this port she went to Martinique, where she also received coal and supplies, and from there to Cadiz, at which place she arrived on the 4th of January, 1862.[4] Here she was permitted to go into dock and make some slight repairs.[5] "The captain of that vessel [the Sumter] asked for reparations in her upper works and in her decks, but after a scientific survey scrupulously executed, it was found that such reparations were not necessary, and only those which were justified by an imperious necessity have been authorized."[6] She was ordered away from Cadiz on the 17th.[7] The Minister of the United States at Madrid, in reporting to Mr. Seward, said: "I ought to say, perhaps, that if it had not been for the example of what had taken place with the Nashville in an English port, I am confident that the Sumter would have been forced to go to sea from Cadiz as she came."[8] From Cadiz she went direct to Gibraltar, at which place she arrived on the 18th of January, 1862.

At Martinique.

At Cadiz.

At Gibraltar.

On the 28th of August, 1861, the United States complained to the Government of the Netherlands of the treatment of the Sumter at Curaçao,[9] and on the 8th of October made similar complaint as to the conduct of the colonial authorities on the occasion of her subsequent visit at Paramaribo.[10]

On the 15th of October the Minister of Foreign Affairs advised the Minister of the United States at the Hague, "that the Government of the Netherlands, wishing to give a fresh proof of its desire [to avoid] all that could give the slightest subject for complaint to the United States, has just sent instructions to the colonial authorities, enjoining them not to admit, except in case of shelter from stress (*relâche forcée*,) the vessels of war and privateers of the two belligerent parties, unless for twice twenty-four hours, and not to permit them, when they are steamers, to provide themselves with a quantity of coal more than sufficient for a run of twenty-four hours."[11]

On the 30th of September, 1861, Mr. Adams made complaint to Earl Russell of the manner in which the Sumter had been received at Trinidad, but as early as the 29th of August the Duke of Newcastle had transmitted to the Foreign Office a report from the Governor of the island to the Colonial Office, and which was, of course, in the possession of Earl Russell when he received the communication from Mr. Adams. In that report of the Governor this passage occurs:

> A great deal of trade goes on between Trinidad and the northern ports of North America, and Captain Semmes, I imagine, has not failed to take this opportunity of obtaining information with regard to the vessels employed under the flag of the United States in this traffic. Fears are entertained with regard to one or two now expected. It is to be hoped that the presence of the Sumter in these waters will soon be made generally known, and that, while the civil war continues, the lumber and provision trade, any interruption of which would cause serious embarrassment to this community, will be carried on in British bottoms.[12]

[1] Brit. App., vol. ii, p. 5.
[2] Ibid., p. 81.
[3] Ibid., p. 1.
[4] Ibid., p. 114.
[5] Ibid., p. 116.
[6] Brit. App., vol. vi, p. 119.
[7] Adams to Seward, Am. App., vol. ii, p. 579.
[8] Brit. App., vol. vi, p. 119.
[9] Ibid., p. 69.
[10] Ibid., p. 81.
[11] Ibid., p. 84.
[12] Brit. App., vol. ii, p. 1.

On the 4th of October Earl Russell informed Mr. Adams, "the Law Officers of the Crown have reported that the conduct of the Governor was in conformity to Her Majesty's proclamation."[1]

On the 1st of November the Minister of the United States at Rio Janeiro complained to the Government of His Majesty the Emperor of Brazil of the conduct of the provincial authorities during the stay of the Sumter at Maranham.[2] A long correspondence ensued, connected with the visit of this vessel and those of other insurgent cruisers subsequently, which resulted in the promulgation of the instructions to the presidents of the provinces of the Empire, under date of the 23d of June, 1863, to which reference has already been made.[3]

It is sufficient for the purposes of this Argument for the United States to say, that during the contest between them and the insurgents, abuse of neutrality was never tolerated in the ports of the Netherlands or Brazil, and these ports were never suffered to be used, by either of the belligerents, "as the base of their operations against the commerce of the adverse party."

It is true that, on the 31st of January, 1862, certain "orders to be observed in all the ports of the United Kingdom, and those of Her Majesty's transmarine territories and possessions," were issued by Her Britannic Majesty's Government,[4] and that, by the "first and second of the * * * orders, belligerent vessels were absolutely excluded from the ports, roadsteads, and waters of the Bahama Islands, except in case of stress of weather, or of special leave granted by the lieutenant-governor." It is also true that, "to vessels of the Confederate States it [access to these islands] was of great importance, the harbors of these States being generally, though not always, effectively blockaded."[5] But the United States have not yet been able to discover that the "special leave" required by the orders was ever, during the entire contest, withheld by the Lieutenant-Governor from any insurgent vessel of war, and that, too, notwithstanding the long-continued and flagrant abuses of the hospitalities of British ports, to which the attention of the Arbitrators has already been directed.

The Sumter went to Gibraltar for coal. The Consul of the United States was enabled to prevent her obtaining a supply from the merchants at that port, until the arrival of certain vessels of war of the United States in the adjoining waters of Spain, and, after that time, her movements were so closely watched by these vessels, that she was never able to escape in the character of a ship of war.

Her crew was discharged and paid off in April,[6] and previous to the 8th of December, while she was yet in port fully armed, a private contract was made by the insurgents for her sale for £4,000. The purchasers were ready with the money to pay for her, and receive the bill of sale, but "all the papers required by them could not be produced by the officer in charge, * * * who, it appears, holds a power of attorney from a certain Bullock, who styles himself senior naval officer in the Confederate service in Europe, and, I am told, is at present in England, giving his attention to what relates to the marine service of the rebel States."[7] In consequence of this informality, the sale was not consummated, and on the same day, the 8th, she was advertised to be sold at public auction.[8] The Consul of the United States protested

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[1] Brit. Case, p. 14.
[2] Brit. App., vol. vi, p. 5.
[3] *Ante.*, p. 287.
[4] Brit. Case, p. 15.
[5] Ibid., p. 17.
[6] Brit. Case, p. 18.
[7] Sprague to Adams, Am. App., vol. ii, p. 507.
[8] Ibid., p. 509.

against such sale being allowed in the port, stating, among other things, that it was being "made for the purpose of avoiding a capture by the cruisers of the United States."[1] It seemed to the commander of the United States war-vessel Kearsarge that "the sale of so-called Confederate war-vessels in British ports is an act as unfriendly and hostile to our [his] Government, as the purchase of war-vessels in their ports by the same party."[2] He therefore advised the consul to enter his protest against the sale.

On the 19th, the form of a sale was gone through with, but the nominal purchaser was M. G. Klingender, intimately connected with the firm of Frazer, Trenholm & Co.[3] She afterward received a British registry, and went to Liverpool under British colors, and from that time was used as an insurgent transport.

At Liverpool.

On the 14th of October, 1863, the following significant letter was written by Prioleau, of the firm of Frazer, Trenholm & Co., at Liverpool, to Major Huse, which explains itself:

> Touching the Gibraltar, formerly Sumter, did you not advise the government that you had taken her for the war department? They do not understand it out there, and you must come here and settle it somehow as early as you conveniently can. I will adopt either of three courses which you may prefer: To ignore our ownership altogether, and consider her always the property of the government. 2d. To sell her to the government at a fair valuation on her leaving here. 3d. To keep her as our own from the time of purchase in Gibraltar, and charge you the regular rate of freight for the voyage to Wilmington, say £60 per ton. The first is the best plan, I think. Certainly for the government it is. Of course you know that it was *not* she that was sunk in this harbor. She was at Wilmington lately, and before she *is* lost or returns here, the matter ought to be arranged.[4]

As has been seen, the sale of the Georgia was afterward permitted in the port of Liverpool. After that, but not until the 9th of September, 1864, an order was promulgated by Her Majesty's Government, that "for the future no ship of war belonging to either of the belligerent powers of North America shall be allowed to enter, or to remain, or be in any of Her Majesty's ports, for the purpose of being dismantled or sold."[5]

When this order was made the insurgents had no armed ship of war to be dismantled or sold.

THE NASHVILLE.

This vessel, like her predecessor, the Sumter, had, previous to the outbreak of the rebellion, been employed in the merchant service of the United States as a packet running between New York and Charleston. She passed the blockade at the latter port, on the night of the 26th of August, having been lightened for that purpose,[6] and arrived at the port of St. George, in the island of Bermuda, on the 30th, a little more than three days after leaving her home port.[7]

The Nashville.

At Bermuda.

She presented herself at Bermuda as a vessel of war.

Governor Ord, in his report to the Duke of Newcastle, says: "I have

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[1] Brit. Case, p. 18.
[2] Am. App., vol. ii, p. 510.
[3] Ibid., p. 515.
[4] Am. App., vol. vii, p. 71.
[5] Brit. App., vol. iii, p. 20.
[6] Bernard's Neutrality, p. 267.
[7] Brit. Case, p. 20.

the honor to acquaint your excellency that these islands were visited, on the 30th ultimo, by the Confederate States paddle-wheel steamer Nashville, commanded by Lieutenant Peagram."[1] The Duke of Newcastle, in sending this report to the Foreign Office, describes her as the "Confederate States steam-vessel Nashville."[2] In point of fact her character as a ship of war is conceded in the British Case, as on page 20 it is stated "that she was commissioned as a ship of war," and that "her commander applied for leave to draw a supply of coals," &c. And in the letter of Earl Russell to Mr. Adams, replying to the claim by Mr. Adams, that she was not a vessel of war, found on page 21, it is said, "The undersigned has to state that the Nashville appears to be a Confederate vessel of war; her commander and officers have commissions in the so-styled Confederate Navy."

She was allowed to coal at Bermuda, and it was known to Governor Ord, when he saw her taking on coal, as he did, that, when she left Charleston, "it was intended to coal at Bermuda."[3] He also knew that she was a vessel of war, and that she was on her way to England, for he says, "She has every chance of reaching England unmolested by the United States vessels of war."[4]

She could not run the blockade with a full supply of coal, as she had been compelled to diminish her draught for that purpose; therefore, she was short of effective power as a vessel of war when she left her home port. An increase of her supply of coal, beyond what she had originally on leaving Charleston, would augment her naval force, and if she left her home port with the intention of thus augmenting her power when she arrived at Bermuda, and the Governor, with a knowledge of that intention, allowed it to be done, he did suffer the insurgents to make use of that port of Her Majesty's dominions as a base of naval operations against the United States.

The run from Charleston to Bermuda, as has been seen, occupied but little more than three days. On arrival, her supply of coal was exhausted. Her voyage from Bermuda to Southampton lasted from the 4th to the 21st of November, or between seventeen and eighteen days. To enable her to make that voyage, she had permission to take on board six hundred tons of coal.[5] It now appears she only took four hundred and forty-two and a half, or four hundred and seventy-two and a half tons;[6] but it matters little whether this was the true amount, or that which was originally supposed and reported by the Governor. Either was sufficient to enable her to reach and destroy the Harvey Birch on the 19th, within two days' run of Southampton. Without this supply that capture could not have been made.

In the British Counter Case it is said, "No act appears to have been done by the Governor, and no permission asked or granted."[7] Therefore, it is claimed there was no permission given to coal. At the same time it is admitted the Governor suffered the taking on of an unlimited supply.

After leaving Nassau, and after the destruction of the Harvey Birch, she arrived at Southampton, and was permitted to repair and coal. On her way from Southampton to a port of the insurgents, she stopped again at Bermuda from the 20th to the 24th of February, and took on coal from the British ship Mohawk.[8] At Southampton.

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[1] Brit. App., vol. ii, p. 87.
[2] Ibid.
[3] Ibid., p. 88.
[4] Ibid.
[5] Gov. Ord to Duke of Newcastle, Brit. App., vol. ii, p. 87.
[6] Brit. App., Counter Case, vol. v, p. 13.
[7] Page 70.
[8] Brit. App., vol. ii, p. 128.

This was only a few days after the Governor had informed the Consul of the United States that it had been "decided not to allow the formation, in any British colony, of a coal depot for the use of" the vessels of war of the insurgents or the United States.[1] After leaving Bermuda, and before attempting to enter any port of the insurgents, she destroyed one vessel.

From this it will be seen that the Nashville received her entire supplies, during her career as a vessel of war, from the ports of Great Britain.

THE RETRIBUTION.

The Retribution.

This was a sailing vessel of about one hundred tons measurement,[2] with one small gun on deck,[3] which, early in the year 1863, cruised for a short time about the Bahama Banks. Her first officer was Vernon Locke, who either had been, or afterwards became, a clerk for Adderley & Co., at Nassau.[4]

It does not appear, from the evidence furnished by either of the Governments, when or where she was armed or commissioned. She was originally a steam-tug, and employed at Buffalo, in the State of New York, upon Lake Erie. Just before the outbreak of the rebellion, she was taken into the service of the United States and brought to the Atlantic coast. Being driven by stress of weather into Cape Fear River, she was, just previous to the attack on Fort Sumter, seized by the insurgents.[5] The United States have no knowledge of the use made of her after that time, until she appeared upon her cruise.

About the 28th of January, 1863, she captured the schooner Hanover, which was taken by Locke, the first officer of the Retribution (as is supposed) to Long Cay, a small island of the Bahamas. She was accompanied to that island by the schooner Brothers, owned by the Messrs. Farrington, doing business at that place. Locke, on his arrival, assumed the name of the master of the Hanover, consigned, as it appeared upon her papers, to Mr. Richard Farrington."[6] His object was to sell the cargo, and he made a statement of the reasons which induced him to come into port, which Farrington said he "doubted," but "did not see any impropriety in his acting as the captain's agent," "inasmuch as the captain came to him properly documented."[7] A part of the cargo was sold at Long Cay, and a part was shipped on the schooner Brothers to Nassau, and there placed in charge of James T. Farrington, esq., sen., one of the magistrates of Fortune Island, (Long Cay.)[8] The Hanover was at the same time loaded with salt and sailed for one of the ports of the insurgents.[9]

Complaint as to these transactions was made to the Governor of the Bahamas on the 11th of March, and he requested the advice of the Attorney-General as to "what steps ought to be taken."[10] The Attorney-General replied, on the 16th, "that the collector of the revenue, if he had any cause to suspect the character of the vessel and cargo, should at once have arrested both."[11] On the 20th of April, a Mr. Burnside, a magistrate of Inagua, made a statement of facts, as he had ascertained them upon an inquiry instituted for that purpose.[12] This statement was

[1] Am. App., vol. vi, p. 213.
[2] Brit. App., Counter Case, vol. v, p. 193.
[3] Ibid., p. 190.
[4] Ibid., p. 196.
[5] Am. App., vol. vi, p. 736.
[6] Brit. App., Counter Case, vol. v, p. 168.
[7] Ibid., p. 168.
[8] Ibid., 165, 189.
[9] Brit. App., Counter Case, vol. v, p. 165.
[10] Ibid.
[11] Ibid., p. 166.
[12] Ibid., p. 167.

laid before Mr. Seward by Lord Lyons, and, on the 24th of June, Mr. Seward took occasion to say to his lordship, that "the information thus communicated is acceptable, so far as it goes, but is not deemed altogether conclusive. There still remains a painful doubt on the mind of this Government whether the authorities and others at Long Cay were, as Mr. Burnside thinks, ignorant that the Hanover was a prize to the Retribution. I shall be happy if the inquiry shall be prosecuted so far as may be necessary to show that the undoubted just intentions of Her Majesty's Government have been obeyed."[1] Lord Lyons, on the 30th of June, informed Mr. Seward that he should "lose no time in communicating this request to Her Majesty's Government and to the governor of the Bahamas."[2] The inquiry does not, however, seem to have been prosecuted, or, if it was, the United States have not been advised of the result.

In May the Attorney-General caused Locke to be arrested for the offense committed by his personation of the master of the Hanover, and, upon a preliminary examination of the charge before a police magistrate, about the 26th of July, it appeared that the business at the customs at Long Cay was transacted principally by Mr. Richard Farrington, who was the agent or consignee, and who, when examined and confronted by the defendant, "could not swear to his being the person who represented himself as * * * the master of the schooner * * * but believed him to be the person."[3] The police justice, in reporting upon the case, at the request of the colonial secretary, on the 10th of March, 1864, says Farrington "would" not swear to the identity.[4] After this the accused was let to bail, in the sum of £100, for his appearance at court for trial.[5] He was tried in the following May at Nassau, but acquitted, as the evidence was not sufficient to satisfy a jury, selected from that locality, of his identity.[6] An examination of the testimony, however, as it is found reported in the British Appendix, Counter Case, vol. v, pp. 188 *et seq.*, will, we think, hardly satisfy the minds of the Arbitrators that "the authorities and others at Long Cay were ignorant that the Hanover was a prize to the Retribution." It may, however, show why it was that the inquiry suggested by Mr. Seward had not been prosecuted.

On the 19th of February the American brig Emily Fisher, on a voyage from Guantonomo, Cuba, to New York, while near Castle Island, one of the Bahamas, and in British waters, was boarded by the British wrecking-schooner Emily Adderley. What then occurred is told in the affidavit of the master of the brig, as follows:

> That having questioned the captain of the said vessel [Emily Adderley] closely, he was told that there were no privateers, or steamers, in the passage; that soon afterward the schooner hauled down the British flag and then hoisted it again; that at the same time he saw a schooner coming out from under the land, but was told that she was a wrecking-schooner; that soon after this said schooner came under the lee of the brig and sent a shot across her bows, at the same time running up the rebel flag; that she then sent a boat with eight men well armed on board, and ordered him on board the schooner with all his papers; that on arriving on board, the captain, after examining his papers, told him that he was a prize to the confederate schooner Retribution, and ordered him and his crew to be put into irons, which was done; that at noon the irons were removed from himself and the first officer, and they were allowed the privilege of the cabin; that all this time the brig was working up under the land, where five British wrecking-schooners were anchored; that the privateer anchored about one and one-half miles from the shore, when, at about 3 p. m., a wrecker's boat came alongside; that after some conversation with the crew in a loud voice, the captain of the privateer told them in an undertone to have two vessels alongside the brig that night;

[1] Brit. App., Counter Case, vol. v, p. 170.
[2] Ibid.
[3] Ibid., p. 175.
[4] Ibid., p. 177.
[5] Ibid.
[6] Ibid., p. 188.

that at about 5 p. m. they ran the brig on shore, and ten or twelve wreckers' boats went alongside of her; that at 6 p. m. Mr. Grey, the officer in charge of the brig, came on board the privateer, and the deponent was then told he could have his boat to go on board the brig and take what personal property Mr. Price might see fit to give him; that he found two wrecking-schooners alongside and about one hundred men on board the brig; that having taken the personal effects into the boat he landed on Acklin's Island, made a tent, and passed the night; that the next day the wreckers were still alongside; that he went on board the brig, she being then afloat, and made a claim on the wreckers for the brig and cargo. He was told he could not have her, and that if the anchor was lifted the privateer would sink her; that he then protested against removing any more of the cargo, as the brig was afloat and was in British waters, but the protest was disregarded; that the next day the wreckers had an interview with the captain of the privateer, and at 1 p. m. sent him word that they were going to a port of entry and that the deponent and his crew could go with them; that at 2 p. m. the privateer, the brig, and all the wreckers started for Long Cay, and arrived there about 8 p. m. the same day; that the wrecker, on board which were deponent and his crews, was anchored under the guns of the privateer, which kept a guard all night, while Mr. Grey and Mr. Price, two officers, went over to town; that on Monday, 23d, the deponent went also to town, and after making inquiry, found that the captain of the privateer would not allow him to go on board the brig; and that the deponent was told by the authorities that though the law would not allow the privateer to touch the brig, if he wished to do so they had no means of preventing him; that the deponent was not able to obtain possession of the brig until after he had bargained with the wreckers to pay them 50 per cent. on the cargo, and 33½ per cent. on the vessel, when, after making affidavit of his being the master, he was placed in possession by the collector and went on board; that he found the hull, spars, and rigging in good order, but everything movable, on and under deck, stolen; that on the next day, 24th, he commenced receiving sugar from the wreckers, and on the 25th found on board eighty-three hogsheads, five tierces, and four barrels, the balance of cargo having been taken ashore by the wreckers; that the wreckers stove hogsheads and barrels, and passed the sugar into their boats, and landed it on the beach; that the captain of the privateer told him, the deponent, that he had given the cargo to the wreckers, as he wanted the brig; that he was going to put his guns on board of her, and destroy his schooner; that he further told the deponent that the wreckers were to pay him something handsome, and that the deponent believes they did so; that deponent was obliged to accept the wreckers' terms at the port of entry, because the brig lay under the guns of the privateer, and the authorities declared their inability to protect him. And the deponent further says, that the capture of his vessel and the destruction of her cargo were brought about by and with the connivance and assistance of the captains and crews of the British wrecking-schooners, and within the jurisdiction of the British government, where he was entitled to protection, but could not obtain it until he had submitted to the terms of the wreckers, all of whom were British subjects, through whose connivance the vessel had been stranded and the cargo destroyed.[1]

After this, (the 19th of February,) and before the 8th of March, the Retribution entered the port of Nassau as an insurgent vessel of war.[2] The "special leave" called for by the regulations of the British Government, under date of January 31st, 1862,[3] seems never to have been asked for or granted. Her commander was not even called upon for his commission. All that occurred upon her arrival is thus stated by the pilot:

She had a small gun on deck. The captain told me he was from Long Cay. I asked the captain where he was from. He answered, "Long Cay." I saw from the look of the vessel and the appearance of the crew, their clothing, that she was likely to be an armed vessel. I then asked him if she was a vessel of war. I begged him to excuse my being so particular, as I was instructed to do so, to put such questions. He told me she was an armed vessel."[4]

On the 3d of March, which was eight days before the complaint was made to the Governor on account of the capture of the Hanover, and two weeks after the transactions with the Emily Fisher, in which the "wrecking-schooner Emily Adderley" took so prominent a part, Henry Adderley & Co. sold, or pretended to sell, the Retribution, in the port of Nassau, at public sale, to C. R. Perpall & Co., for £250. On the 26th

[1] Brit. App., Counter Case, vol. v, p. 190.
[2] Brit. App., Counter Case, vol. v, p. 196.
[3] *Ante*, p. 296.
[4] Am. App., vol. vi, p. 738.

of the same month, Perpall & Co. sold her for the same amount to Thomas Stead, and he, on the 10th of April, obtained for her a register as a British ship.[1] Previous to her sale she was condemned by a board of survey,[2] Perpall, the ostensible purchaser, being one of the board.[3]

THE TALLAHASSEE.

The Tallahassee.

It will be remembered by the Arbitrators that, when presenting for their consideration the facts connected with the claim of the United States for acts committed by the Shenandoah, we had occasion to call their attention to a letter written by the insurgent Secretary of the Navy to a Mr. Charles Green, bearing date as early as the 1st of July, 1861, in which, referring to the purchase of vessels to be used as transports, and the shipment of arms, &c., from England for the use of the insurgents, it was said: "It is probable that, being a British subject, you might secure the shipment under British colors."[4] Less than fifty days after the date of that letter, Mr. Adams, in addressing Earl Russell upon the subject of the "transport Bermuda, and the information he had obtained as the ground for an application for a prompt and effective investigation of the truth of the allegations whilst there is time," called his lordship's attention to the fact that "she is stated to carry English colors."[5] From that time until the end of the rebellion, the fact that the blockade-running, and the transportation of articles contraband of war, for the use of the insurgents, was carried on, almost exclusively, under the protection of the English flag, became very frequently the subject of direct complaint by Mr. Adams to Earl Russell.

The correspondence upon this subject will be found collected in volume I of the American Appendix, pages 719 to 785, and it shows conclusively that the insurgent Government was in the constant practice of procuring a British registry, and of using the British flag, for all or nearly all transports. We also claim that it shows that this practice was tolerated by Great Britain.

As late as the 20th of January, 1865, the Lieutenant-Governor of Bermuda, in communicating with the home government, took occasion to say: "I would further state that the Chameleon's register is Confederate States. Hence there is another legal question to which I should be glad to have an answer, viz, is a merchant-ship, sailing under the flag of, and registered by, an unrecognized nation, to be received in our ports on the same terms as a trader under a recognized flag? I find that this is not the first instance of a ship trading hither with a confederate register, though most of the blockade-runners are British."[6]

On the 31st of March, 1864, the Consul of the United States at London informed Mr. Seward that "on the Thames their activity in forwarding all enterprises in aid of the Confederacy is kept up with nearly as much vigor as on the Clyde. Another double screw, called the Atlanta, similar in most respects to those which have preceded her, has her sails bent, coals and supplies in, appears quite ready to leave."[7]

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[1] Brit. App. Counter Case, vol. v, p. 190.
[2] Ibid., p. 196.
[3] Ibid., p. 191.
[4] *Ante*, p. 236.
[5] *Ante*, p. 238.
[6] Brit. App., Counter Case, vol. v, p. 151.
[7] Am. App., vol. vii, p. 727.

Again, on the 1st of April, he says: "The double screw is called the Atlanta. Her sails are bent, and she appears quite ready for sea. I consider the Edith and her the finest ships of the whole batch of double screws."[1]

On the 8th of April, it was reported to the Consul that "this double screw [the Atlanta] left the docks on Sunday last, adjusted compasses same day, and sailed on the 4th of April from Greenhithe, and arrived at Falmouth on the next day. She cleared for Bermuda in ballast, (coal.)"[2]

On the 20th she arrived in Bermuda, making the passage in eleven days. The Consul at Bermuda says, in his report to Mr. Seward: "This vessel is undoubtedly faster than any heretofore here. She is to be under the command of Captain Horner, formerly of the Flora, and recently in the Index. He is an Englishman by birth."[3]

Again, on the 30th of May, he says: "The following steamers [six in all] have left here to run the blockade, probably for Wilmington. * * * May 24, Atlanta, Horner, master."

On the 6th of August the Atlanta, with her name changed to the Tallahassee, left Wilmington, North Carolina, armed as a vessel of war, and ran the blockade of that port. On the 18th of the same month she arrived at Halifax, Nova Scotia, for coal, having, in the mean time, destroyed a large number of vessels.[4] She remained in port about forty hours, and, having supplied herself with coal for her return, sailed on the 19th, and again reached Wilmington through the blockade on the 26th.[5]

The United States, having had reason to believe she had been armed at Bermuda, complained to the Government of Great Britain. The matter was referred to the authorities at Bermuda, and on the 14th of November, 1864, the Lieutenant-Governor reported:

> The Atlanta was reported here from Wilmington, with cargo, on the 6th of last July, and she was cleared on the 11th of July for Nassau, with a cargo of seven hundred cases of preserved meats, and fifty casks of bacon; she left under British certificate of registry, and carrying British merchandise. All the requisites to a regular clearance were fulfilled. If she went to Wilmington, as is probably the case, notwithstanding her having cleared for Nassau, she would have reached that port about the 15th or 16th of July, between which dates and the 1st of August she probably took in her armament. Everything, except direct testimony, is against the belief that the Tallahassee was armed at Bermuda.[6]

The Tallahassee remained in commission until the 15th of December, 1864,[7] and cruised for a short time off the coast, in the early part of November, under the name of the Olustee. On this cruise she made a few captures, and returned to Wilmington.[8]

After her armament was removed she was loaded with cotton, and, on the 27th of December, under the name of the Chameleon, left Wilmington, for Bermuda. At that port she was loaded with a return cargo for Wilmington, but, being unable to run the blockade, proceeded to Nassau. From there she attempted to get into Charleston, but, being prevented in this, returned to Bermuda; and from there went to Liverpool, consigned to Frazer, Trenholm & Co.[9]

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[1] Am. App., vol. vii, p. 727.
[2] Ibid.
[3] Am. App., vol. vii, p. 728.
[4] Brit. App. Counter Case, vol. v, p. 144.
[5] Am. App., vol. vi, p. 726.
[6] Brit. App. Counter Case, vol. v, p. 150.
[7] Am. App., vol. vi, p. 726.
[8] Ibid., p. 733.
[9] Brit. App. Counter Case, vol. v, p. 161.

THE CHICKAMAUGA.

The Chickamauga.

This vessel was formerly the blockade-runner Edith. The consul of the United States at London, in writing Mr. Seward on the 11th of March, 1864, said: "The steamer Edith, the last double screw completed, left on Wednesday last for Bermuda. The Edith makes the ninth double-screw steamer which has been built for the rebel service in this port."[1] She was employed as a blockade-runner, and as such was once or twice at Bermuda. Having been armed at Wilmington she ran through the blockade on the 28th of October, 1864, as a cruiser, and reached Bermuda in that capacity on the 6th of November. Here she was supplied with coal from the bark Pleiades, and, after remaining nine days, got under way, and returned to Wilmington, where she arrived on the 19th of November. Her armament was then taken out of her, and she was reduced to her original condition as a transport.

[1] Am. App., vol. vi, p. 723.

XI.—CONSIDERATION OF THE DUTIES OF GREAT BRITAIN, AS ESTABLISHED AND RECOGNIZED BY THE TREATY, IN REGARD TO THE OFFENDING VESSELS, AND ITS FAILURE TO FULFILL THEM, AS TO EACH OF SAID VESSELS.

We are now prepared for a definite application of the law and the facts, under which the determination of the Tribunal is to be made, to the question of the duties of Great Britain, in the premises of the Arbitration, and its performance thereof or failure therein.

The ample discussions of pertinent questions and principles of public and municipal law, to be found in the Cases and Counter Cases of the two Governments, and subjected to comment in an earlier part of this Argument, it is not our purpose here to repeat or renew. We shall better observe the requirements of the Argument at this stage of it, by a brief statement of the propositions which should assist and control the judgment of the Arbitrators in deciding the main issue of fact on which their award is to turn, that is to say, the inculpation or the exculpation of Great Britain in the matter of the offending vessels.

PROPOSITIONS OF LAW.

MEASURE OF INTERNATIONAL DUTY.

Rules of the treaty imperative.

I. The Three Rules of the Treaty furnish the imperative law as to the obligations of Great Britain in respect of each of the vessels which is brought under review. The moment that it appears that a vessel is, in itself, within the description of the first article of the Treaty, as being one of "the several vessels which have given rise to the claims generically known as the 'Alabama Claims,'" it becomes a subject to which the three rules are applicable.

Application of the first rule.

II. This primary inquiry of fact, which simply determines that the *jurisdiction* of the Tribunal embraces the vessel, is followed, necessarily, by the further inquiry of fact, whether or no the vessel, in its circumstances, falls within the predicament of either the first clause or the second clause of the first rule. If it does, the Tribunal has further to consider whether Great Britain has used, in regard to said vessel, the "due diligence" which is insisted upon by that rule, and the failure in which inculpates Great Britain, and exposes it to the condemnation of responsibility and reparation therefor to the United States.

Application of the second and third Rules.

III. Whatever may be the scope and efficacy of the second Rule, and of the third Rule, in future or in general, for the purposes of the present Arbitration, the subjects to which either of them can be applied, in reference to the issue of the inculpation or exculpation of Great Britain, must be embraced within the limitation of the first article of the Treaty, and so, connected with some or one of "the several vessels which have given rise to the claims generically known as the 'Alabama Claims.'" But in regard to any such vessel, the

general injunctions of these two Rules furnish, in their violation, a ground for the inculpation of Great Britain, and its condemnation to responsibility and reparation therefor to the United States.

IV. It is not at all material or valuable, in its bearing upon the deliberations or award of the Tribunal, to inquire whether the obligations of duty laid down in the Three Rules are commensurate with the obligations imposed by the "principles of International Law which were in force at the time when the claims mentioned in Article I [of the Treaty] arose." These Rules constitute the LAW of this controversy and of this Tribunal in its jurisdiction of it, by force of the twofold declaration, (1) that, "in deciding the matters submitted to the Arbitrators, they shall be governed" by them, and (2) that "in deciding the questions between the two countries arising out of those claims, the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these Rules."

These Rules constitute the law of this controversy.

V. The true force of the subordinate provision that, besides the Rules, "such principles of International Law, not inconsistent therewith, as the Arbitrators shall determine to have been applicable to the case," shall govern them in their decision, is, necessarily, to introduce from the general doctrines of International Law whatever may corroborate or increase the vigor of the Rules, and their scope and efficiency, but to admit nothing, from such general doctrines, in reduction or disparagement of the Rules.

Nothing admissible which diminishes their force.

VI. An assent to these indisputable propositions disposes of a very considerable part of the more remote argument of the Case and Counter Case of Her Majesty's Government.

(*a*) The duties in respect of which the conduct of Great Britain, in fulfilling or failing to fulfill the same, is to be judged by the Tribunal, are, by the terms of the Treaty, authoritatively assigned as duties of Great Britain towards the United States, of international obligation. Not only does the Treaty declare that Great Britain was "*bound*" to the fulfillment of these duties, but it further declares that "the Arbitrators should *assume that Her Majesty's Government had undertaken to act*" in obedience to that obligation. All speculations, therefore, of a legal or practical character, presented in the Case or Counter Case, and turning upon the question of the duties here under judgment being duties of Great Britain to its own alws and its own subjects, and its accountability to the United States being only secondary and of comity, seem unprofitable to the present inquiry.

The obligation of Great Britain to observe these rules was an international one.

(*b*) The efforts of the Case and Counter Case to ascribe to, or apportion among, the various departments of national authority, legislative, judicial, and executive, principal or subordinate, the true measure of obligation and responsibility, and of fault or failure, in the premises, *as among themselves*, seem wholly valueless. If the sum of the obligations of Great Britain to the United States was not performed, the Nation is in fault, wherever, in the functions of the state or in their exercise, the failure in duty arose.

This obligation not affected by internal distribution of powers of British government.

(*c*) So, too, the particular institutions or habits of the people of Great Britain, or the motives or policy of its Government in respect of commercial freedom, unrestricted activity, maxims or methods of judicial procedure, limitations of prerogative, and similar internal arrangements of people and Government, cease to have any efficacy in determining the judgment of this Tribunal upon the fulfillment of, or default in, international duty. Domestic liberty, however valuable to, and in, a state, is not a warrant for international

Nor by the institutions or habits of the British people.

license; nor can its advantages be cherished by Government or people at the cost of foreign nations. Indeed, when a special obligation or particular motive induces, and in some sense justifies, failure in international duty, the offending nation assumes the necessary amends and reparation to the foreign state. A notable instance of this is found in the course of the United States toward Great Britain, when the former had failed in what they admitted to be their international duty to prevent the outfit of French privateers, by reason of certain special relations to France. Compensation to Great Britain for injuries by the offending cruisers was conceded.

VII. The preceding observations leave the affirmative statement of the obligations resting upon Great Britain to secure the fulfillment of this international duty to the United States, free from difficulty.

Great Britain should have used seasonable, appropriate, and adequate means to preserve its neutrality.

(*a*) These obligations required that all SEASONABLE, APPROPRIATE, and ADEQUATE means to the accomplishment of the end proposed, should be applied and kept in operation by Great Britain, from the first occasion for their exhibition until the necessity was over.

Which means should have been available as soon as required.

(*b*) As the situation calling for the discharge of these obligations on the part of Great Britain was not sprung upon it unawares, but was created by the Queen's Proclamation, (a measure of state adopted after deliberation in its own Government, and upon conference with another great European power,) the means to meet the *duties* of the proclaimed neutrality should, at once, have been found at the service of the Government, or promptly prepared, if deficient, that no space might intervene between the deliberate assumption of these duties by the Government, and a complete accession of power to fulfill them.

British sympathy with insurgents an element to be considered in preparing means.

(*c*) The dangers and difficulties that would attend and embarrass the Government in the fulfillment of these duties, from the actual disposition of its own people, and the urgent needs of the Rebel belligerents, constituted necessary elements in the estimate of the actual duties the Government must be prepared to fulfill, and in the forecast of the means to meet and cope with such dangers and difficulties. The immense temptation to British interests to absorb the share of the commerce of the world, which its great competitor possessed, the immense temptation to the Rebel belligerents to allure these interests of the British people to an actual complicity in the preparation and maintenance of maritime hostilities, and, finally, to drag the British Government into formal war against the United States, were within the immediate field of observation to Her Majesty's Ministers, and made a principal feature of the situation they had produced, and were required to control. The British Case and Counter Case have given prominence to these considerations, in deprecation of the judgment of this Tribunal against Great Britain for the actual incompetency with which it met the duties of the situation. They tend rather to a condemnation, in advance, for negligence of Great Britain, thus advised of the duty imposed upon it, and failing to meet it successfully.

Other elements to be considered.

(*d*) The aptitude or sufficiency of the system or staff of public officers at the command of the Government for the required service of this international duty to the United States; the possession of Executive power to conduct the duties of the situation of neutrality which it had been competent to create, or the need of recourse to Parliament to impart it; the force and value of the punitive or repressive legislation designed to deter the subjects from complicity in the Rebel hostilities, in violation of the Government's duties to prevent such

complicity;—all these were to be dealt with as practical elements in the demands upon the Government in fulfillment of its duties, and were to be met by well-contrived and well-applied resources of competent scope and vigor.

In view, then, of all these considerations, from the issue of the Queen's Proclamation to the close of the rebellion, the Rules of the Treaty of Washington exact from Great Britain the preparation and the application, in prevention of the injuries of which the United States now complain, of *seasonable*, *appropriate*, and *adequate* means to accomplish that result.

THE MEANS OF FULFILLING INTERNATIONAL DUTY POSSESSED BY GREAT BRITAIN.

I. That Great Britain possessed all the means which belong to sovereignty, in their nature, and, in a measure, of energy and efficacy, suitable to her proud position among the great Powers of the world, to accomplish whatever the will of the Government should decree, has never been doubted by any other Power, friendly or hostile. The pages of the British Case and Counter Case devoted to suggestions to the contrary, will not disturb this opinion of the world, and Great Britain, for the purposes of this Arbitration and the judgment of the Tribunal, must remain the powerful Nation which it is, with the admirable Government which it possesses in all other relations. Whatever infirmity shall have shown itself in the conduct of the Government, in the premises of this inquiry, it is attributable solely to debility of purpose or administration, not to defect of power.

Her Majesty's Government possessed full power to carry out its selected course of action.

II. The whole body of the powers suitable to the regulation and maintenance of the relations of Great Britain, *ad extra*, to other nations, is lodged in the Prerogative of the Crown. The intercourse of peace, the declaration and prosecution of war, the proclamation and observance of neutrality, (which last is but a division of the general subject of international relations in time of war,) are all, under the British Constitution, administered by the Royal Prerogative. Whether, or to what extent, the common or the statute law of England may or should punish, by fines or forfeitures, or personal inflictions, acts of the subjects that thwart or embarrass the conduct by the Crown of these *external relations of the nation*, are questions which belong to domestic policy. Foreign nations have a right to require that the relations of Great Britain with them shall be suitably administered, and defective domestic laws, or their defective execution, are not accepted, by the law of nations, as an answer for violations of international duty.

The Prerogative of the Crown.

We refer to the debates in Parliament upon the Foreign Enlistment Bill in 1819, and on the proposition to repeal the Act in 1823, and to the debate upon the Foreign Enlistment Bill of 1870, (as cited in Note B of the Appendix to this Argument,) as a clear exhibition of this doctrine of the British Constitution, in the distinction between the executive power to *prevent* violations of international duty by the Nation, through the acts of individuals, and the *punitive* legislation in aid of such power, which needed to proceed from Parliament.

We refer, also, to the actual exercise of this Executive power by the Government of Great Britain, without any enabling act of Parliament to that end, in various public acts in the course of the transactions now in judgment before the Tribunal:

Its exercise during the rebellion.

1. The Queen's Proclamation of Neutrality, May 13, 1861.[1]

2. The regulations issued by the Government of Her Britanic Majesty in regard to the reception of cruisers and their prizes in the ports of the Empire, June 1, 1861; June 2, 1865.[2]

3. The Executive orders to detain the Alabama at Queenstown and Nassau, August 2, 1862.[3]

4. The Executive orders to detain the Florida at Nassau, August 2, 1862.[4]

5. The Executive orders to detain the rams at Liverpool, October 7, 1863.[5]

6. The debate and vote in Parliament justifying the detention of the rams by the Government "on their own responsibility," February 23, 1862.[6]

7. The final decision of Her Majesty's Government in regard to the Tuscaloosa, as expressed by the Duke of Newcastle to Governor Woodhouse, in the following words:

> If the result of these inquiries had been to prove that the vessel was really an uncondemned prize, brought into British waters in violation of Her Majesty's orders made for the purpose of maintaining her neutrality, I consider that the mode of proceeding in such circumstances most consistent with Her Majesty's dignity, and most proper for the vindication of her territorial rights, would have been to prohibit the exercise of any further control over the Tuscaloosa by the captors, and to retain that vessel under Her Majesty's control and jurisdiction, until properly reclaimed by her original owners.—November 4, 1863.[7]

8. The Executive order that, "for the future, no ship of war belonging to either of the belligerent powers of North America shall be allowed to enter or to remain or to be in any of Her Majesty's ports for the purpose of being dismantled or sold,"[8] September 8, 1864.

9. The final Executive orders to retain the Shenandoah in port "by force, if necessary," and to "forcibly seize her upon the high seas,"[9] September and October, 1865.

10. The rejection by Parliament of the section of the new Foreign Enlistment Bill, which provided for the exclusion from British ports of vessels which had been fitted out or dispatched in violation of the act, as recommended by the Report of the Royal Commission. This rejection was moved by the Attorney General and made by Parliament, on the mere ground that this power could be exercised by Order in Council.[10]

That these acts were understood by the Government of Great Britain to rest upon the Prerogative and its proper exercise, is apparent from the responsible opinions of the Law Officers given upon fitting occasions.

1. In regard to the Alabama, the Law Officers of the Crown wrote to Earl Russell on July 29, 1862:

> We, therefore, recommend that, without loss of time, the vessel [the Alabama] be seized by the proper authorities; after which an opportunity will be afforded to those interested, previous to condemnation, to alter the facts, if it may be, and to show an innocent destination of the ship.[11]

2. In the case of Laird's rams, the Law Officers of the Crown wrote to Earl Russell, on October 19, 1863:

> We are of the opinion, with respect to the first question submitted to us, that the answer to parties who have a right to make the inquiry should be that the seizure [of the rams] has been made by the orders of Her Majesty's Government under the authority of the provisions of the Foreign Enlistment Act.[12]

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[1] Brit. App., vol. iii. p. 17.
[2] Ibid., pp. 17–22; ibid., vol. v, pp.125–131.
[3] Ibid., vol. i, p. 203.
[4] Ibid., p. 29; ibid., vol. v, p. 55.
[5] Ibid., vol. ii, p. 384, *et. seq.*
[6] Am. App., vol. v, pp. 472-500.
[7] Brit. App., vol. i, p. 327.
[8] Ibid., vol. iii, p. 20.
[9] Ibid., vol. i, p. 657.
[10] Debate in Parliament, Note B, App. to this Argument.
[11] Brit. App., vol. i, p. 200.
[12] Ibid., p. 405.

3. In the House of Commons, on February 23, 1864, the Solicitor General, speaking of the seizure of the rams and defending the action of the Government, said: "We have done that which we should expect others to do for us, and no more."[1]

In the same debate the Attorney General, Sir Roundell Palmer, said:

The honorable gentleman asks what right the Government had to detain the ships. [Mr. Seymour Fitzgerald: "Hear, hear."] The honorable gentleman cries, "Hear;" but I do not hesitate to say boldly, and in the face of the country, that the Government, on their own responsibility, detained them.[2]

He, Sir Roundell Palmer, said further:

In a criminal case we know that it is an ordinary course to go before a magistrate, and some information is taken of a most imperfect character to justify the accused's committal to prison for trial, the prisoner being remanded from time to time. And that course cannot be adopted in cases of seizing of vessels of this description. The law gives no means for that; and therefore it is that the Government on their own responsibility must act, and have acted, in determining that what had taken place with regard to the Alabama should not take place with respect to these ships.[3]

4. In the House of Commons, on the 28th of April, 1864, the Attorney General, Sir Roundell Palmer, defending the action of the Government in regard to the Tuscaloosa, as expressed in the dispatch of the Duke of Newcastle, before quoted, said:

Can it be said that a neutral sovereign has not a right to make orders for the preservation of his own neutrality, or that any foreign power whatever violating these orders, provided it be done willfully or fraudulently, is protected to any extent by international law within the neutral territory, or has any right to complain on the ground of international law of any means which the neutral sovereign may see fit to adopt for the assertion of his territorial rights? By the mere fact of coming into neutral territory in spite of the prohibition, a foreign power places itself in the position of an outlaw against the rights of nations; and it is a mere question of practical discretion, judgment, and moderation, what is the proper way of vindicating the offended dignity of the neutral sovereign.[4]

5. On the 26th of August, 1864, the Attorney and Solicitor General, writing particularly of the proposed executive order before referred to, in regard to the sale of belligerent war vessels in the ports of Great Britain, used these words:

The enforcement of such orders and directions, concerning as they do ships which, on their entrance into any port of Her Majesty, will have the character of public ships of war of a foreign Power, and will not yet have become the property of any of Her Majesty's subjects, does not belong to the municipal law of this country, but to the same branch of the Royal Prerogative, by virtue of which Her Majesty has the power of making peace and war and generally of conducting and controlling the external relations of this country with foreign Governments.[5]

6. On the 21st of April, 1865, the Law Officers of the Crown thus wrote to Earl Russel, in reply to a request for instructions to Governor Darling:

With respect to his Excellency's request that he may receive instructions as to the propriety of executing any warrant under the Foreign Enlistment act on board a Confederate (public) ship of war, we are of opinion that, in a case of strong suspicion, he ought to request the permission of the commander of the ship to execute the warrant; and that, if this request be refused, he ought not to attempt to enforce the execution; but that, in this case, the commander should be desired to leave the port as speedily as possible, and should be informed that he will not be re-admitted into it.[6]

V. That the faculties for this *preventive* service are inseparable from the Executive power of every Government, in the conduct of its foreign relations, is proved by the concurrent evidence furnished in the proofs laid before the Arbitrators, respecting the means possessed by the principal nations of Europe, and by the

Preventive power inseparable from the idea of executive power.

[1] Am. App., vol. v, p. 496.
[2] Ibid., p. 477.
[3] Am. App., vol. v, p. 470.
[4] Ibid., p. 570.
[5] Brit. App., vol. i, p. 465.
[6] Ibid., p. 558.

United States and Brazil as well, for the fulfillment of the international duties of neutrality. The full power was exercised by the administration of President Washington before any such authority was imparted by Congress, and the later explicit communication of such authority by the legislation of the United States rested upon the propriety of corroborating Executive power under a Government without any personal prerogative in its Executive head. This distinction was well understood in the British Parliament, and is insisted upon in the debate upon the Foreign Enlistment Bill of 1819, set forth in Note B of the Appendix to this Argument. It was to this consideration that the *preventive* vigor which constitutes so important a difference between the *statutes* of the United States and Great Britain owes its origin.

Peculiar advantages of Her Majesty's Government for the exercise of Executive power.

VI. The limited territory of Great Britain, its complete system of magistracy, its extensive and ramified organization of commercial and port regulations, for the inspection and control of its immense customs revenue, shipping, and navigation, its network of railroads and telegraphs, which brought every part of its narrow territory under the eye and hand of the central administration, gave to the Government the instant and universal means of executing its purposes of international duty, without chance of miscarriage or need of delay.

Omnipotence of Parliament.

VII. The omnipotence of Parliament, the great principle of the British constitution, was always at the service of the Government, to supply, extend, or confirm its authority in the matter of international duty, and the means and agencies of its prompt, vigilant, and adequate exercise. Parliament was in session at the time of the Queen's Proclamation, and took notice, at the moment, of the effects it had produced in the law of piracy as applicable to the maritime violence it would induce, as well as of the probable maritime instruments that the Rebel interests would press into their service. Parliament was in session, also, when the Florida and Alabama were in course of construction, when the Government was deliberating upon their detention, and when they actually escaped unimpeded. The alacrity with which Parliament could respond with immediate and effective legislation at the call of the Government, and upon the occasion of *opening war* calling into exercise the fulfillment by Great Britain of its international duty of neutrality, is clearly shown by the debate and action of Parliament in the passage of the new foreign-enlistment act of 1870. We refer again to Note B of the Appendix to this Argument.

Upon the whole, then, it is not to be gainsaid that the Government of Great Britain had at its command every means in their nature and in their energy and scope that any Power needs or possesses for the fulfillment of the obligations assigned to it within the premises of this Arbitration, by the Treaty of Washington or the law of nations.

THE DUTY OF GREAT BRITAIN IN ITS TREATMENT OF THE OFFENDING VESSELS AFTER THEIR FIRST ILLEGAL OUTFIT AND ESCAPE FROM BRITISH PORTS.

I. This subject, discussed at some length in the British Case and Counter Case, may be disposed of by a few elementary propositions:

The privilege of ex-territoriality accorded to a vessel of war is political and discretionary.

(*a*) It is undoubtedly consonant with principle and usage, that a public-armed vessel of a sovereign power should be accorded certain privileges in the ports and waters of other national jurisdictions not accorded to private vessels. The substance of these privileges is a limited concession of the character

of continued territoriality of the State to which they belong, and a consequent exemption from the *jurisdiction of the courts and process* of the nation whose ports or waters they visit. But the same reason which gives support to this immunity throws them under the immediate political treatment of the hospitable State, as represented by its Executive head, in the conduct of this international, if subordinate, relation. How, under the circumstances of each case calling for Executive action, the vessels are to be dealt with is determined, in the first instance, by the Government having occasion to exhibit the treatment. For its decision, and the execution of it, it is responsible, politically and internationally, and not otherwise, to the sovereign whose public ships have been so dealt with. That, ordinarily, the offense calling for remonstrance or intervention would not be made the subject of immediate and forcible correction, applied to the vessel itself, but would be brought to the attention of its sovereign for correction or punishment and apology, or other amends, may be assumed. But all this is at the discretion of the power having occasion to exert, control, seek redress, or exhibit resentment. The flagrancy or urgency of the case may dictate another course, to be justified to the sovereign affected upon such considerations.

(*b*) When, however, the anomalous vessels of a belligerent *not recognized as a nation or as a sovereign* claim a public character in the port of hospitality, the only possible concession of such character must, in subtracting them from judicial control, subject them to immediate political regulation *applied to the vessels themselves.* There is behind them no sovereign to be dealt with, diplomatically or by force. *The vessels themselves* present and represent at once whatever theoretical public relation exists or has been accepted. To hold otherwise would make the vessels wholly lawless and predominant over the complaisant sovereign, helplessly submissive to the manifold *irresponsibilities* the *quasi* public vessels assume to themselves.

It should not be acceded to a belligerent not recognized as a political power.

(*c*) The necessary consequence is that when the offending vessels of the non-sovereign belligerent have taken the seas only by defrauding or forcing the neutrality of the nation whose hospitality they now seek, such nation has the right, and, as toward the injured nation demanding its action upon the offending vessels, is under the obligation, to execute its coersive, its repressive, its punitive control over the vessels themselves. It cannot excuse itself to the injured nation for omission or neglect so to do by exhibiting its resentment against, or extorting redress from, any responsible sovereign behind the vessels; nor can it resort to such sovereign for indemnity against its own exposure to reprisals or hostilities, by the injured nation, or for the cost of averting them.

The only remedy against such belligerent, in a case like the present, is the remedy against the vessels themselves.

II. Upon these plain principles, it was the clear duty of Great Britain, in obedience to the international obligations insisted upon by the Treaty, and the supporting principles of the law of nations invoked by its requirement, to arrest these offending vessels as they fell under its power, to proscribe them from all hospitality or asylum, and thus to cut short and redress the injury against the United States which it had, for want of "due diligence" in fulfilling its duty of neutrality, been involved in. The *power*, full and free, to take this course is admitted by the British Government in its Case and Counter Case. Whatever motives governed Great Britain in refusing to exercise this power, such refusal, as toward the United States, is without justification, and for the continued injuries inflicted by the offending vessels Great Britain is responsible, and must make indemnity.

Great Britain ought, therefore, to have seized the vessels.

DUE DILIGENCE AS REQUIRED BY THE THREE RULES OF THE TREATY AND THE PRINCIPLES OF INTERNATIONAL LAW NOT INCONSISTENT THEREWITH.

Due diligence.

I. The subject of "due diligence," both in its nature and its measure, as an obligatory duty of Great Britain under the Three Rules of the Treaty, is much considered, upon principle and authorities, in the Case of the United States, and is commented upon, with some fullness, in the British Case and Counter Case. Neither a very technical nor a merely philosophical criticism of this definite and practical phrase, adopted by the High Contracting Parties and readily estimable by the Tribunal, can be of much service in this Argument. Some propositions and illustrations ~~may aid the A~~rbitrators in applying the obligation thus described to the facts and circumstances under which its fulfillment or failure therein is to be decided by their award.

After proof of hostile acts on neutral territory, the burden of proof is on the neutral to show due diligence to prevent them.

II. The foundation of the obligation of Great Britain to use "due diligence to *prevent*" certain acts and occurrences within its jurisdiction, as mentioned in the Three Rules, is that those acts and occurrences within its jurisdiction are offenses against international law, and, being injurious to the United States, furnish just occasion for resentment on their part, and for reparation and indemnity by Great Britain, *unless* these offensive acts and occurrences shall be affirmatively shown to have proceeded from conduct and causes for which the Government of Great Britain is not responsible. But, by the law of nations, the state is responsible for *all* offenses against international law arising within its jurisdiction, by which a foreign State suffers injury, unless the former can clear itself of responsibility by demonstrating its freedom from fault in the premises.

The High Contracting Parties, mindful as well of this principal proposition of responsibility of a State as of this just limitation upon it, have assigned as the true criterion by which this responsibility is to be judged, in any case arising between nations, the exhibition or omission on its part of "due diligence to prevent" the offenses which, of themselves, import such responsibility. The offenses and the injuries remain, but the responsibility of the one nation and the resentment of the other therefor are averted by exculpation of the State at whose charge the offenses lie, upon adequate proofs to maintain its defense.

The nature of the presumptive relation which the State bears to the offenses and injuries imputed and proved, necessarily throws upon it the burden of the exculpatory proof demanded, that is to say, the proof of due diligence on its part to prevent the offenses which, in fact, and in spite of its efforts, have been committed within its jurisdiction, and have wrought the injuries complained of.

III. It is incumbent, then, upon Great Britain to satisfy the Tribunal that it used "due diligence to prevent" what actually took place, and for which, in the absence of such "due diligence to prevent," the Tribunal will adjudge it responsible. The nature of "diligence," and the measure of it exacted by the qualifying epithet "due," may now be considered.

Diligence not a technical word.

(*a*) The English word *diligence* in common usage, and in the text of the treaty alike, adheres very closely to the Latin original, *diligentia*. It imports, as its derivation from *diligo* (to love, or to choose earnestly) requires, enlistment of zealous purpose toward the object in view, and activity, energy, and even vehemence, in its attainment. It has been adopted both in the civil law and in the common law of England, from common speech, and for this virtue in its

vulgar meaning, which can give practical force and value to the legal duty it is used to animate and inspire. So far, then, from the word bearing a technical or learned sense, in its legal application either to private or national obligations, the converse is strictly true. A definition from approved authorities of the English language, common to the high contracting parties, is the best resort for ascertaining the sense intended in the text of the treaty. Webster defines "diligence" as follows: "Steady application in business of any kind; constant effort to accomplish what is undertaken; exertion of body or mind, without unnecessary delay or sloth; due attention; industry; assiduity." He gives also this illustrative definition: "*Diligence* is the philosopher's stone that turns everything to gold;" and cites, as the example of its use, this verse from the English Scriptures: "Brethren, give *diligence* to make your calling and election sure."

We confidently submit that no appreciation of the sense of this cardinal phrase of the Treaty is at all competent or adequate which does not give full weight to the ideas of enlisted zeal, steady application, constant effort, exertion of all the appropriate faculties, and without weariness or delay, attention, industry, and assiduity.

(*b*) The qualifying epithet "due" is both highly significant and eminently practical. It requires the "diligence," in nature and measure, that is *seasonable, appropriate, and adequate* to the exigencies which call for its exercise. It is to be, in method, in duration and in force, the diligence that is suitable to, or demandable by, the end to be accomplished, the antecedent obligations, the interests to be secured, the dangers to be avoided, the disasters to be averted, the rights that call for its exercise.[1] "*Præstat exactam diligentiam*," a phrase of the civil law, is a just description of the undertaking "to use due diligence." Those who incur this obligation to prevent an injury are excused from responsibility, if they fail only by deficiency of power. "Ceux qui, pouvant empêcher un dommage que quelque devoir les engageait de prévenir, y auront manqué, pourront en être tenus suivant les circonstances."[2]

"Due" implies seasonableness, appropriateness, and adequateness.

(*c*) The British Case and Counter Case attempt to measure "due diligence" in the performance of this international duty to the United States in the premises of this Arbitration by the degree of diligence which a nation is in the habit of employing in the conduct of its own affairs. It is objection enough to this test that it resorts to a standard which is in itself uncertain and fluctuating, and which, after all, must find its measure in the same judgment which is to pass upon the original inquiry, and to which it may better be at once and directly applied. It is quite obvious, too, that this resort can furnish no standard, unless the domestic "affairs" referred to be of the same nature, magnitude, and urgency as the foreign obligations with which they are thus to be compared. Probably, the United States might be well satisfied with the vigilance and activity, and scope and energy of means, that Great Britain would have exhibited to prevent the outfit and escape from port of the Alabama and her consorts, had *her own commerce* been threatened by the hostilities they were about to perpetrate, and her own ships been destined to destruction by the fires they were to light. But this is not the standard which the Arbitrators are invited to assume by this reasoning of the British Case and Counter Case. They are expected to measure the due diligence

Objections to British definition of the term.

[1] See Webster's Dictionary *in verbo* DUE.

[2] Domat, Lois civiles, liv. ii, tit. 8, § 4, No. 8.

which Great Britain was to use, under the requirements of the Treaty, to prevent the destruction of the commerce and maritime property of the United States by the ordinary system of detection of frauds upon the customs. Even this comparison would not exculpate, but would absolutely condemn, the conduct of Great Britain in the premises; but the standard is a fallacious application of the proposed measure of diligence, and the measure itself, as we have seen, is wholly valueless.

Judicial definitions by British and American courts.

III. The maxims and authorities of the law of "due diligence" in the determination of private rights and redress of private injuries may not very often present sufficiently near analogies, in the circumstances to which they are applied, to the matter here under judgment, to greatly aid the deliberations of the Tribunal. There is, however, one head of the law of private injuries, familiar to the jurisprudence of these two great maritime powers, which may furnish valuable practical illustrations of judicial reason which they both respect, and whose pertinency to certain considerations proper to be entertained by the Arbitrators cannot be disputed. We refer to the law of responsibility and redress for *collisions at sea*.

In the first place, this subject of marine collisions is regarded by scientific writers on the law of diligence as falling within the rules which govern liability for *ordinary negligence*, the position in which the contentions of the British Case and Counter Case seek to place international responsibility of Great Britain to the United States.

In the second place, the controversy between the parties in these cases is admitted to exclude the notion of intent or willful purpose in the injury, an element so strongly insisted upon in defending Great Britain here against the faults laid to her charge by the United States.

In the third place, the circumstances of difficulty, danger, obscurity, uncontrollable and undiscoverable influences, and all possible opportunities of innocent error or ignorance, form the staple elements of the litigation of marine collisions, as they are urged, with ingenuity and persistency, in defense before this Tribunal against the responsibility of Great Britain for the disasters caused to the United States by the means and agencies here under review.

And, lastly, the eminent judges who have laid down the law for these great maritime Nations, in almost complete concurrence, in this department of jurisprudence, have not failed to distinguish between *fault* and *accident*, in a comprehensive and circumspect survey of the whole scene and scope of the occurrences, from the moment that the duty arose until the catastrophe, and through all the stages of forecast, precaution, provision, and preparation, which should precede, and of zeal, activity, promptitude, and competency, which should attend, the immediate danger. We cite a few cases, not dependent upon a knowledge of their special facts for the value of the practical wisdom they inculcate, and taken, with a single exception, from British decisions:

In law, inevitable accident is that which a party charged with an offense could not possibly prevent by the exercise of ordinary care, caution, and maritime skill. It is not enough to show that the accident could not be prevented by the party at the very moment it occurred, but the question is, could previous measures have been adopted to render the occurrence of it less probable? (The Virgil, 7 Jur., 1174; 2 W. Rob., 205; Notes of Cases, 499; The Juliet Erskine, 6 Notes of Cases, 633; The Mellona, 3 W. Rob., 13; 11 Jur., 783; 5 Notes of Cases, 450; The Dura, 5 (Irish) Jur., (N. S.,) 384.)[1]

In order to establish a case of inevitable accident, he who alleges it must prove that what occurred was entirely the result of some *vis major*, and that he had neither contributed to it by any previous act or omission, nor, when exposed to the influence of the force, had been wanting in any effort to counteract it. (The Despatch, 3 L. J., (N. S.) 220.)[2]

[1] Pritchard's Adm. Dig., 2d ed., vol. i, p. 133.

[2] Ibid., p. 134.

It is not a *vis major* which excuses a master, that his vessel had caused damages to another in a tempest of wind, when he had warning and sufficient opportunity to protect her from that hazard. (The Lotty, Olcott, Adm., 329.)[1]

It is no excuse to urge that from the intensity of the darkness no vigilance, however great, could have enabled the vessel doing the damage to have descried the other vessel in time to avoid the collision. In proportion to the greatness of the necessity, the greater ought to have been the care and vigilance employed. (The Mellona, 11 Jur., 783; 3 W. Rob., 13; 5 Notes of Cases, 450.)[2]

It is necessary that the measures taken to avoid a collision should not only be right, but that they should be taken in time. (The Trident, 1 Spink's Eccl. and Adm. Rep., 222.)[3]

If circumstances arise evidently and clearly requiring prudential measures, and those measures are not taken, and the natural result of such omission is accident, the court would be inclined to hold the party liable, even if such result were only possible. (The Itinerant, 2 W. Rob., 240; 8 Jur., 131; 3 Notes of Cases, 5.)[4]

The want of an adequate look-out at the time on board a vessel at sea is a culpable neglect on her part, which will, *prima facie*, render her responsible for injuries received from her. (The Emily, Olcott, Adm., 132; 1 Blatch. Ct. Ct., 236; The Indiana, 1 Abb., Adm., 330.)[5]

To constitute a good look-out there must be a sufficient number of persons stationed for the purpose, who must know and be able to discharge that duty. The George, 9 Jur., 670; 4 Notes of Cases, 161.[6]

IV. In assigning a just force to the "due diligence," upon the presence of which, in the failure of Great Britain actually to prevent the injuries complained of, its exculpation by the tribunal is to turn, we have had no occasion to insist upon any severity or weight of obligation too burdensome for the relation of neutrality to endure. On the contrary, both the sentiments and the interests of the United States, their history and their future, have made, and will make, them the principal advocates and defenders of the *rights* of neutrals before all the world. In pleading before this Tribunal for indemnity at the hands of Great Britain for the vast injuries which its non-fulfillment of neutral *duties* has caused, the United States desire no rule or measure of such duties to be assumed or applied by this tribunal that its enlightened and deliberate judgment would not assign as suitable to govern the conduct of each one of the equal and independent Powers which are represented in this Arbitration. The United States do not themselves undertake to become to other nations *guarantors* of the action of all persons within their jurisdiction, and they assert no such measure of responsibility against Great Britain. They lay no claim to *perfection* or *infallibility* of administration, or security against *imposition*, *misadventure*, *miscarriage*, or *misfortune*, nor would they seek to charge Great Britain, or any other nation, upon any such requirement or accountability. But the United States do maintain that the disposition and action comporting with "due diligence," as reasonably interpreted, are adequate to prevent, and will prevent, but for extraordinary obstacles or accidents, violations, by a powerful State, of its duties to other nations; that when such prevention fails, the proof of this disposition and action toward prevention, and of the obstacles and accidents that thwarted the purpose and the effort, are demandable by the aggrieved nation, and that upon that proof the judgment of exculpation or inculpation is to proceed.

The United States do not desire a severe construction.

They do not propose to become guarantors of their people.

V. In conclusion, we conceive that the Arbitrators are unquestionably the rightful judges of what constitutes "due diligence," in the sense of the Treaty, and that this secures not only to the contending parties, but to the rights, duties, and interests

The Arbitrators the judges of what constitutes due diligence.

[1] Pritchard's Adm. Dig., 2d ed., vol. i, p. 134, note.
[2] Ibid., p. 135.
[3] Ibid., p. 140.
[4] Ibid., p. 141.
[5] Ibid., p. 134, note.
[6] Ibid., p. 143.

cared for by the law of nations, a reasonable, a practical, and a permanent rule and measure of obligation, just in its judgment of the past, and wise and beneficent in its influence on the future. We concur in the final considerations of the British Counter Case on this subject of due diligence, in leaving "the Arbitrators to judge of the facts presented to them by the light of reason and justice, aided by that knowledge of the general powers and duties of administration which they possess as persons long conversant with public affairs."[1]

[1] Brit. Counter Case, p. 125.

XII.—THE FAILURE OF GREAT BRITAIN TO FULFIL ITS DUTIES, AS ESTABLISHED AND RECOGNIZED BY THE TREATY, CONSIDERED UPON THE FACTS.

CONSIDERATIONS OF GENERAL APPLICATION.

It is assumed in the British Case, and argued in addition in the Counter Case, that the only vessels which fall within the description of the first Article of the Treaty as "the several vessels which have given rise to the claims generically known as the "Alabama claims,'" are the Florida, Alabama, Georgia, and Shenandoah. As to these vessels there is no contention in this respect, and they and their history and career are included, indisputably, within the jurisdiction conferred upon the Tribunal by the Treaty of Washington.

The vessels concerning whose acts the contention is.

The Case of the United States sets forth a list of certain other vessels, which they understand to be embraced within the jurisdiction of the Tribunal, and the circumstances of whose dispatch and career bring them within the application of the Rules of the Treaty, and of the condemnation of Great Britain by the Tribunal for failure to fulfill the duties in this regard insisted upon by these Rules, and the principles of International Law not inconsistent therewith. Of these, three, viz, the Clarence, the Tacony, and the Archer, are described as tenders of the Florida; and one, the Tuscaloosa, as a tender of the Alabama. The others, the Sumter, the Nashville, the Retribution, the Tallahassee, and the Chickamauga, are independent vessels. In addition to the evidence furnished by the history of each of these vessels in the Case of the United States, the Counter Case presents special considerations to show that all these vessels fall within the description of the Treaty jurisdiction of the Tribunal.[1]

The specific facts connected with these several vessels have been made the subject of comment in previous pages of this Argument, and they do not need to be further specially noted at present. Undoubtedly the "considerations of fact of general application," which now occupy our attention, have their most important relation to the Florida, the Alabama, the Georgia, and the Shenandoah, the principal agents in the injuries to the United States which enter into the subject of this Arbitration, and any special applicability to the circumstances of the other vessels need not at present attract our attention.

We present now to the notice of the Arbitrators certain GENERAL FACTS which inculpate Great Britain for failure to fulfill its obligations in the premises, as assigned by the Treaty.

Failure of Great Britain to fulfill its obligations.

I. The absolute omission by Great Britain to organize or set on foot any scheme or system of measures, by which the Government should be put and kept in possession of information concerning the efforts and proceedings which the interests of the Rebel belligerents, and the co-operating zeal or cupidity of its own subjects would and did plan and carry out, in violation of its neutrality,

Negligence in obtaining information.

[1] Counter Case of the United States, pp. 3, 4.

is conspicuous from the outset to the close of the transactions now under review. All the observations in answer to this charge, made in the contemporary correspondence, or in the British Case or Counter Case, necessarily admit its truth, and oppose the imputation of want of "due diligence" on this score, upon the simple ground that the obligations of the Government did not require it, and that it was an unacceptable office, both to Government and people.

No general means of immediate action provided.

Closely connected with this omission was the neglect to provide any systematic or general official means of immediate action in the various ports or ship-yards of the kingdom, in arrest of the preparation or dispatch of vessels, threatened or probable, until a deliberate inspection should *seasonably* determine whether the hand of the Government should be laid upon the enterprise, and its project broken up and its projectors punished. The fact of this neglect is indisputable; but it is denied that the use of "due diligence to prevent" involved the obligation of any such means of prevention.

No general instructions to maintain vigilance.

We cannot fail to note the entire absence from the proofs presented to the Tribunal of any evidence exhibiting any desire or effort of the British Government to impress upon its staff of officers or its magistracy, of whatever grade, and of general or local jurisdiction, by proclamation, by circular letters, or by special instructions, any duty of vigilance to detect, of promptitude to declare, of activity to discourage, the illegal outfit or dispatch of vessels in violation of international duty towards the United States.

No officers charged with instituting and maintaining proceedings

It is not less apparent that Great Britain was without any prosecuting officers to invite or to act upon information which might support legal proceedings to punish, and, by the terror thus inspired, to prevent the infractions of law which tended to the violation of its international duty to the United States. It was equally without any system of executive officers specially charged with the execution of process or mandates of courts or magistrates to arrest the dispatch or escape of suspected or incriminated vessels, and experienced in the detective sagacity that could discover and appreciate the evidence open to personal observation, if intrusted with this executive duty.

It is no answer to the imputation of want of "due diligence" in all this, that Great Britain dispensed with prosecuting officers in its maintenance of public justice, and relied upon the private interests of aggrieved parties to prosecute, at their own charge, and by their own lawyers, for crimes or offenses against the laws. It may be that murder, and burglary, and forgery, and frauds, in Great Britain, can be thus safely left to private prosecutions, because of the common interest and protection of the community securing due attention to the public justice, where *all* are enlisted to punish, and *all* feel the need of protection. But what analogy is there, in this situation, to the case of international obligation, where a foreign nation is the only sufferer, and interest and feeling in the domestic community are, at the best, indifferent and remote from the crime and its consequences? The actual hostile disposition of the population of the ports and emporiums of Great Britain at the time of these international injuries to the United States we need not, for the purpose of this suggestion, insist upon.

No steps taken to break up the hostile system.

The result of all this was that the Government of Great Britain, in the various ways we have suggested, exhibited none of the disposition or action which we have insisted upon as included in the requirement of "due diligence to prevent" the occurrence of the injuries to the United States from the offending ves-

sels of which they now complain. Early advised and persistently reminded by the Minister of the United States of the system and organization introduced within the jurisdiction of Great Britain to prepare, put forth, and maintain from thence maritime war against the United States, the Government of Great Britain took no steps to be informed of, to break up, or to punish this *system*, or preclude or render difficult, in advance, particular projects in aid of this general purpose. It early adopted and steadily adhered to the method (1) of regarding the whole duty as a domestic one of enforcement of municipal law, and (2) of reducing the function of the Executive Government of England to that of a magistrate receiving the complaints of the United States, and, with such legal acumen as it could command, disposing of them upon the sole consideration of the completeness of the offense against the municipal law, and the competency and sufficiency of the proof in hand to secure a conviction, should a prosecution be thought worth while.

This theory and practice of Great Britain, rejecting the international duty and, necessarily, omitting any spontaneous, strenuous, and organized movements, *as a Government*, towards or in the discharge of such duty, were in themselves wholly inconsistent with, and contrary to "due diligence to prevent" the injuries to the United States, for which redress is now asked through the judgment of the Tribunal.

The idea of an international duty toward the United States rejected.

The proposition covers the case of vessels which, in the absence of these necessary means for inspection and scrutiny, escaped the special notice of the Government. That they were not complained of, or discovered by the Minister of the United States, does not relieve Great Britain from its duty of "due diligence" to discover them, and to prevent their escape. The duty would have existed, if misfortune had deprived the United States of such a representative, or if broken diplomatic relations had removed him from the Kingdom. The proposition covers the cases of the Florida and the Alabama, were their more immediate features less obvious, and Great Britain's failure in duty only general. The proposition covers the cases of the Georgia and the Shenandoah, which escaped without attracting the notice of the British government, for the very best reason in the world, that it had taken no means to observe, to detect, or prevent their departure.

The obligations of Great Britain independent of steps taken by the officers of the United States in Great Britain.

The Arbitrators will observe the wide difference from these views and conduct of Great Britain in the estimate which the United States have put upon their duty in these respects, of spontaneous, organized, and permanent vigilance and activity, and in the methods and efficacy of its performance. On all the occasions upon which this duty has been called into exercise, the Government of the United States has enjoined the spontaneous and persistent activity of the corps of District Attorneys, Marshals, Collectors, and the whole array of their subordinates, in the duties of observation, detection, information, detention, prosecution, and prevention.

These chapters in the history of the law of nations, as observed by the United States, need not here be reviewed. The materials in the proofs before the Arbitrators are ample for their examination, if occasion in their delibrations should arise. Whatever actual failures may have occurred in the execution by the United States of this admitted duty, they have been not for the want of, but in spite of, the exhibition and earnest prosecution of these general, spontaneous, and comprehensive means of prevention, the entire absence of which we complain of in the conduct of the Govern-

The Government of United States always earnest to maintain its duties as a neutral.

ment of Great Britain. Nor has the conduct of other great Powers, under a similar obligation of duty, either adopted the theory or followed the methods by which Great Britain governed itself. That the Government, *as such*, should act and continue to act, and have and use the means of acting, and, *in default of so doing*, be responsible for the consequence, is, we submit, the public law of nations as observed by the principal Powers, including Great Britain in other cases than that now in judgment before the Tribunal.

Absence of this correctness on the part of Great Britain a license for the acts of hostility complained of.

It was the failure of the British Government "to use due diligence" to maintain inviolate its international obligations to the United States, in form, manner, and effect, as above stated, that gave the first warrant and license to the enlistment of the sympathies for the rebels and hostility to the Government of the United States, (which animated such large and influential interests in Great Britain,) in the actual practical service of the Rebellion. It was this absence of an active affirmative *disposition of diligence* in the Government, so apparent to all its subjects, to the Rebel agents, and to the Minister and Consuls of the United States, that threw the whole unchecked freedom of trade and industry, enterprise and appetence of gain, so much insisted upon in the British Case and Counter Case as a necessary part of British liberty, into zealous complicity with, and earnest adhesion to, the maritime war against the commerce of the United States, whose disasters are under review before the Tribunal. In this course of practical non-administration of the duty assigned by the Treaty as *binding* upon Great Britain, we ask the Tribunal to find a definite and substantial failure to fulfill that duty, and to inculpate the Nation accordingly.

As early as August 28, 1861, the principal newspaper of Liverpool (the Post) correctly described the state of feeling in the British community as follows:

> We have no doubt whatever that the vast majority of the people of this country, certainly of the people of Liverpool, are in favor of the cause espoused by the Secessionists. The defeat of the Federalists gives unmixed pleasure; the success of the Confederates is ardently hoped, nay, confidently predicted.

It was an appreciation of this influence prevailing in that community and affecting the local officers of the Government, that prompted Earl Russell to say:

> It appears to me that if the officers of the Customs were misled or blinded by the general partiality to the cause of the South, known to prevail at Liverpool, and that *prima-facie* case of negligence could be made out, Great Britain might fairly grant a sum equivalent to the amount of losses sustained by the captures of the Alabama.[1]

It needs no argument to show that if the Government of Great Britain in 1861 and 1862, when the systematic operations of the Rebel agents, in a community thus enlisted in their cause, were denounced by the Minister of the United States, had used to those agents and that community the language employed by Earl Russell in 1865, and had executed the sentiments thus expressed, there would have been no "Alabama claims" to occupy the attention of this Tribunal. Earl Russell, after stating that "he was sorry to observe that the unwarrantable practice of building ships in this country, to be used as vessels of war against a State with which Her Majesty is at peace, still continues," proceeded to say: "Now, it is very possible that by such shifts and stratagems the penalties of the existing laws of this country, nay, of any law that could be enacted, may be evaded; but the offense thus offered to Her Majesty's authority and dignity by the *de facto* rulers of

[1] Note B of Appendix to this Argument.

the Confederate States, whom Her Majesty acknowledges as belligerents, and whose agents in the United Kingdom enjoy the benefits of our hospitality in quiet security, remains the same. It is a proceeding totally unjustifiable, and manifestly offensive to the British Crown."[1]

II. The next great practical failure to fulfill its duty to the United States, on the part of Great Britain, was in its omission to ascertain its resources of Prerogative and statutory authority for maintaining its neutrality, and to announce to its subjects and to the Rebel agents the possession of these powers and the determination to use them. If an examination had satisfied the Government that it was not endued with the requisite faculties of *prevention*, it should have put them in practice, and scattered the machinations against its peace and honor, and against the maritime interests of the friendly power to which it was so closely engaged to observe its international duty. If, on the other hand, such examination disclosed doubts or defects of *preventive* Power, it should have obtained from Parliament the adequate authority. If the Government received from its principal Law Officers an interpretation of the Prerogative and of the Foreign Enlistment Act, that put at its service the *seasonable*, *appropriate*, and *adequate* means for the prevention of the acts and occurrences within its jurisdiction, which the Rules of the Treaty prescribe, it should have placed the ship-builders of Liverpool and the Clyde in the predicament of open contemners of the laws of the realm, and of actual conflict with the whole power of the Government.

Failure to ascertain extent of Prerogative and statutory powers.

If, on the other hand, these Law Officers advised a corroboration of the preventive power of the Government, it should have been granted by statute. We have searched in vain for any evidence in these regards of "due diligence" on the part of the Government at the opening of the Rebel hostilities. We find inflammation of popular sentiment urging a participation in those hostilities, and instant occasion for the Government to be energetic and alert. We find earnest and persistent appeals to take such a position made to the Government by the representatives of the United States. In 1870, when the war between France and Germany broke out, we find Great Britain enacting a vigorous Foreign Enlistment Statute, and exhibiting zeal and alacrity in the exercise of its new powers, and in putting in motion all the requisite prerogative authority by Orders in Council.

Suppose, for a moment, that in May, 1861, in sequence of the Queen's Proclamation, the Attorney General of England had brought into Parliament a Foreign Enlistment Bill to place at the service of the Executive Government the means of maintaining toward the United States the duties of neutrality which that Government by the Proclamation had assumed—such a Bill as was passed in 1870. Suppose, in so doing, he had, speaking the purposes and motives of the Executive Government, said:

> I think the House will agree that, upon the breaking out of this unexpected and most calamitous war, *Her Majesty's Government would have been very much to blame if they had delayed for a single day to introduce this measure.*[2]

Suppose other members of the Government had supported the Bill by arguments like these:

> He need not adduce arguments to show how unjustifiable and monstrous it would be for British subjects to take part in hostilities, when the avowed policy of the Government was that of perfect neutrality. * * * A similar law existed in the United States; while on the continent, Governments were able to prevent their subjects from violating neutrality.

[1] Am. App., vol. i, p. 631; cited on p. 309, Case of the United States.

[2] Attorney General Collier in Parliament, August 1, 1870. Note B, Appendix to this Argument.

The measure gave power to the Secretary of State to detain a suspected ship; as also to local officers at the ports, who would report to the Secretary of State, so as to cast on him full responsibility. It embodied all the recommendations of the Report, with the exception of that relating to the reception of vessels into British ports, *and this object could be accomplished by Orders in Council.*[1]

Suppose arguments against its interference with freedom and ship-building had been answered as follows:

The fact that war was raging (on the Continent) was no reason for not amending our municipal law in points where this was notoriously defective. It was *ridiculous* to say that a builder did not know that the vessel he was building was for war purposes; and it was a less evil that the ship-building interest should suffer a little, than that the whole nation should be involved in difficulties.[2]

It would not occur in one case out of a thousand that the builder of a ship would have the smallest difficulty in proving what his contract was, and under what circumstances it was undertaken.

The object of the clause was to prevent the escape of suspected ships from the harbors of the kingdom till the Secretary of State has been communicated with. The clause gave an *ad interim* power of seizure.[3]

The object was to give power to any officer who saw a ship about to escape to prevent such escape.

The officers named would be able to seize a vessel without special instructions, in order that such vessel might not be allowed to escape. It was a most important power.

The clause was copied from the Merchant Shipping Act, which had been in force for twenty years without any complaint.[4]

Suppose all this, and we should have seen a performance by the British Government of the duty of "due diligence" in the particular now insisted upon, for the absence of which we now inculpate that Nation. But we should have seen no Florida, or Alabama, or Georgia, or Shenandoah upon the ocean, and redress for injuries would never have needed to be sought from the justice of this Tribunal by the United States.

But we are not left to argument to show how wide and beneficial would have been the practical effects of such action by the British Government, at the opening of the rebel hostilities, in checking and frustrating the proclivities of British subjects to aid and invigorate the maritime war against the United States, nor how readily the subordinate and local official staff could have worked out these provisions of the law. Some extracts from the correspondence of the German Embassador and the British Foreign Secretary will exhibit this influence and its results in the clearest light. Count Bernstorff, under date of October 8, 1870, wrote to Earl Granville an elaborate representation on the subject of the export of contraband of war, and therein speaks as follows:

According to Your Excellency's own admission the executive has the power to prohibit the export of contraband of war. But you state the practice is to make use of this right only in the interest of England, as in the case of self-defense. A letter of the Duke of Wellington to Mr. Canning, dated the 30th of August, 1825, and reprinted in a London newspaper immediately after the indiscretion of Count Palikao, refutes this assumption, proving that England, as a neutral, has repeatedly prohibited the export of arms by an Order in Council, "according to the usual practice," as the renowned Duke says. In one part of his letter the words occur, "I am afraid, then, that the world will not entirely acquit us of at least not doing our utmost to prevent this breach of neutrality of which the Porte will accuse us."

Practice, consequently, is in itself not opposed to the adoption of a measure desired by us for the prohibition of the sale of arms to our enemy. But the law allows Government a certain latitude of consideration to make use of their power according to circumstances. Your Excellency is, however, of the opinion that the present customs

[1] Lord Halifax in Parliament, August 8, 1870. Note B, Appendix to this Argument.
[2] Viscount Bury in Parliament, Aug. 1, 1870, ibid.
[3] Solicitor General Coleridge in Parliament. August, 1870, ibid.
[4] Attorney General Collier in Parliament, August 3, 1870. Note B, Appendix to this Argument.

system would require a radical reform in order to prevent the export of contraband of war. I gladly concede that the lax method of dispatch and control on the part of the custom-house authorities which has become usual in the interest of an unfettered commercial intercourse, bars the energetic carrying out of a measure prohibiting the exportation of contraband of war. But, on the other hand, I think the very fact of such laxity tends to show that, for the purpose of rendering an Order in Council effectual, no new organization would be required, but simply more stringent instructions for the customs and harbor authorities, reminding them of the existing regulations.

In concluding his reply under date of October 21, 1870, Lord Granville says:

Your Excellency will, I think, admit that though Her Majesty's Government are not prepared to change the practice of the country in regard to neutrality, they have been vigilant in watching and checking any symptoms of violation by British subjects of existing law. Some weeks before your excellency drew attention to the cases of the Hypatia and Norseman, the proper authorities of this country had been engaged in investigating them, and the *watchfulness shown on those occasions has doubtless been the reason that no attempt has been made to sell or dispatch vessels in contravention of the Foreign Enlistment Act.* A report which had reached Her Majesty's Government that attempts were being made to enlist Irishmen for military service in France was acted upon with the greatest promptitude by the authorities of the Home Office, even at a time when, *as it appears from the note which you addressed to me on the 11th instant, it did not appear to you that much importance was to be attached to the rumors. I can assure Your Excellency that no effort shall hereafter be spared to deal promptly with any actual or contemplated infractions of the law.*

We respectfully submit that, in the failure of the disposition and the action of "due diligence" in the matters insisted upon under this head of the argument, the conduct of Great Britain merits and must receive the condemnation of the Tribunal, and must render that nation responsible therefor to the United States in its award.

III. The next great failure of Great Britain "to use due diligence to prevent" the violation of its neutrality, in the matters within the jurisdiction of the Tribunal, is shown in its entire omission to exert the direct Executive authority, lodged in the Royal Prerogative, to intercept the preparations and outfits of the offending vessels, and the contributory provisions of armament, munitions and men, which were emitted from various ports of the United Kingdom. We do not find in the British Case or Counter Case any serious contention but that such powers as pertain to the Prerogative, in the maintenance of international relations, and are exercised as such by other great Powers, would have prevented the escape of every one of the offending vessels emitted from British ports, and precluded the subsidiary aids of warlike equipment and supplies which set them forth, and kept them on foot, for the maritime hostilities which they maintained. The contention of the British Case and Counter Case on this head is somewhat indefinite and uncertain, but substantially comes to this: (1) a disparagement of the vigor and extent of this Prerogative; and (2) a deprecation of its vigorous or extensive exercise, for reasons of domestic interest or policy.

Failure to exercise the Royal Prerogative.

We have given full consideration to the question of the *possession* of this Prerogative authority under the head devoted to the subject as a *proposition of law*, and have called the attention of the Arbitrators to the resort to it, from time to time, taken by Her Majesty's Government during the progress of the transactions under review. We are unable to see any discrimination between the occasions and the means for direct interposition of this power of the Government, as we insist upon them, and the occasions on, and means by, which it was actually applied by the Government, except as such discrimination was controlled by choice or disposition. We beg the careful attention of the Arbitrators to the debates in Parliament, cited in note B of the Appendix to this Argument, as bearing upon this question of the Prerogative of the Brit-

ish Crown in all matters of international obligation. These debates are not referred to by us for the sake of the individual opinions or reasoning of the eminent members of various British administrations, and of the leading members of Parliament, that took part in them. Each of these debates is upon an occasion of definite *action* by Parliament on the subjects before it, which commits the national will and authority in support of the propositions insisted upon in the debates, and in the sense in which we insist upon them here.

But, manifestly, there is but one answer that this Tribunal can accept for the omission to use the Royal Prerogative in regulation and control of the situation of neutrality, which had been produced by its intervention, either in respect of its debility or the impolicy, for domestic reasons, of resorting to it. This answer is, a supply of the power, thus failing or intermitted, by other forms of accredited and safe authority that was also *seasonable*, *appropriate*, and *adequate*. This brings us to the consideration of the mode in which existing *statutory* powers were wielded, and the plenary authority of Parliament to improve or extend them, was dealt with by Her Majesty's Government.

IV. The insufficiency and inefficacy of the Foreign Enlistment Act of Great Britain, in force during the whole period of the American Rebellion, if it included the whole *preventive* power possessed by Her Majesty's Government for the fulfillment of the duties prescribed by the Three Rules of the Treaty, are both undisputed and indisputable. The absolute omission from its provisions of *all* Executive authority, except in subservience to the judicial proceedings and punitive purposes of the law, furnishes to our minds a strong argument, if any further were needed, that, as was held in the Parliamentary discussion which attended its passage, its provisions were punitive and punitive only, *because* the direct authority of *interception* and *prevention* was possessed by the Crown.

The Foreign Enlistment Act was an insufficient means for performing international duties, and its efficacy was diminished by judicial construction and official requirements.

But if, in addition to this debility of the Statute as a resort for *seasonable*, *appropriate*, and *adequate* means of fulfilling the international duty in question, apparent upon *any* construction of the Statute, we take the Statute, impoverished and emasculated, (1,) by judicial construction of its narrow reach to punish and deter; (2,) by the impossible requirement in the matter of evidence: that is to say, the requirement of *voluntary evidence sufficient to convict*, before accusation or arrest of person or vessel; and (3,) by the timidity, alike of Cabinet Ministers and Custom House Officers, and all intermediate Executive functionaries, in *undertaking* the execution of the law, for fear they should themselves be berated for their audacity, or condemned in damages as trespassers and law-breakers, for daring to interfere with the domestic liberty of British subjects to engage in war against American commerce, while their Government was at peace with the United States—taking, we say, the Statute, as *thus* construed and administered, there can be no pretension that the furnishing of a Government, as the sum of its authority, with powers so *unseasonable*, *inappropriate*, and *inadequate*, for the fulfillment of this international obligation, was compatible with that obligation as enjoined by the Three Rules of the Treaty.

Now, the true measure of the force and value of a statute as an expression of the sovereign's will and purpose, is to be found in its judicial interpretation and its practical execution. Some pains have been taken in the British Case and Counter Case to insist upon the equality with, or perhaps the superiority over, the Neutrality Act of the United States shown in the Foreign Enlistment Act of Great Britain. Compared

upon the text of their provisions, the great feature of *preventive* power in the American statute, stamps with manifest distinction these two systems of legislation. But compared in the practical efficiency which judicial interpretation and administrative execution have imparted to the American statute, as a part of its substantive vigor and value, and in the debility by the same means infused into the British Act, they are scarcely to be recognized as parallel legislation.

Certain great features mark the American Act as a working means to the Government for fulfilling the international obligations within its purview:

Contrast between this act and the American statute as construed and administered.

1. The direct and unlimited administrative power vested in the President as the Executive head of the Government, to intercept, arrest, and prevent, by strong hand, the meditated international injury, by detaining, upon discretion, suspected instruments of such purposed injury.

2. The personal inflictions and the property forfeitures visited upon participation in the offense at any stage, and in any degree, *however far short of completion in fact, or however small in agency*, by the American Act as interpreted and applied, *provided* the project or purpose when completed and combined is illegal, gave the Government the means of *punitive* intervention, with effect and in time, to intercept and frustrate, even by judicial means, the projected schemes.

3. The initiation of judicial proceedings at early stages of illegal enterprise gave at once the opportunity to coerce proof by compulsory process, and made it the necessary interest of the parties interfered with to establish the innocent, or abandon the guilty, design.

4. The American statute stimulated the zeal of direct private interest to the service of conveying information and securing evidence to forfeit the offending vessel, by rewarding this service by the payment of one-half of the forfeiture to the informer. The influence of such a feature in the risk of illegal outfits of great and powerful cruisers, worth hundreds of thousands of pounds, is threefold in its operation: (1) The direct exposure of the enterprise, while in progress, to betrayal and conviction, by this appeal to the interests of some or one of the hundreds of subordinates, in the confidence of the transaction by necessity. (2) The discouragement to the offending belligerent to *undertake* an enterprise, thus in peril up to the moment when it might have absorbed the full investment of its funds. (3) The danger to the neutral ship-builder from this prolonged menace, from the cupidity which might strike him when the blow would fall upon his own capital, wholly uncovered by payments. It is not too much to say that projects of the magnitude, both in value and in length of time, involved in the building of a Florida or an Alabama, were little likely to risk the danger of a casual or a professional informer under such an inflammation to his zeal.

5. The exclusive judicial enforcement of the American Act is confided to the Federal Courts in their admiralty jurisdiction, as courts known to and governed by the law of nations, and not to the local, domestic, and common-law tribunals of the States. The Constitution of the United States, with sagacious comprehension of the duty and the difficulty of maintaining a jurisprudence in questions of international relation, trustworthy to and trusted by the interests of foreigners and foreign States, has vested the exclusive admiralty jurisdiction in the Courts of the United States, and by this jurisdiction the forfeiture of ships under the Neutrality Act is adjudicated.

We refer the Tribunal for a most competent authority on this whole subject of American jurisprudence and its methods of securing the

practical end in view by even judicial means, to the *note* of Mr. Dana, the learned commentator on Wheaton, which is printed in full in vol. VII of the American Appendix, pp. 11–38. We quote a few passages.

Our obligation arises from the law of nations, and not from our own statutes, and is measured by the law of nations. Our statutes are only means for enabling us to perform our international duty, and not the affirmative limits of that duty. We are as much responsible for insufficient machinery, when there is knowledge and opportunity for remedying it, as for any other form of neglect. Indeed, a nation may be said to be more responsible for a neglect or refusal which is an imperial, continuous act, and general in its operation, than for neglect in a special case, which may be a fault of subordinates.[1]

As to the preparing of vessels within our jurisdiction for subsequent hostile operations, the test we have applied has not been the extent and character of the preparations, but the intent with which the particular acts are done. If any person does any act, or attempts to do any act, toward such preparation, with the intent that the vessel shall be employed in hostile operations, he is guilty, without reference to the completion of preparations, or the extent to which they may have gone, and although his attempt may have resulted in no definite progress toward the completion of the preparations. The procuring of materials to be used, knowingly, and with the intent, &c., is an offense. Accordingly, it is not necessary to show that the vessel was armed, or was in any way, or at any time, before or after the act charged, in a condition to commit acts of hostility.[1]

No cases have arisen as to the combination of materials, which, separated, cannot do acts of hostility, but united constitute a hostile instrumentality, for the intent covers all cases and furnishes the test. It must be immaterial where the combination is to take place, whether here or elsewhere, if the acts done in our territory, whether acts of building, fitting, arming, or of procuring materials for these acts, be done as part of a plan by which a vessel is to be sent out with intent that she shall be employed to cruise.

As to penalties and remedies, parties guilty are liable to fine and imprisonment; and the vessel, her apparel and furniture, and all materials procured for the purpose of equipping, are forfeited. In cases of suspicion revenue officers may detain vessels, and parties may be required to give security against hostile employment; and the President is allowed to use the army and navy or militia, as well as civil force, to seize vessels, or to compel offending vessels, not subject to seizure, to depart from our ports. What vessels shall be required to depart is left to the judgment of the Executive.[2]

Observe, now, the practical operation of the Foreign Enlistment Act as it was worked by Her Majesty's Government in fulfillment of its obligation "to use due diligence to prevent" the infractions of neutrality practiced to the prejudice of the United States.

1. *All* preventive intervention, in that name and of that design, was excluded from the resources of the law. It was confined to punishment of *committed* offenses. The personal inflictions were not severe enough to deter; and the proceedings to forfeit a guilty vessel for a committed offense might, incidentally, by its judicial arrest, thwart, or delay her injurious cruise; but only incidentally. The punitive prosecution for forfeiture might have place *after*, as well as in anticipation of, the hostile cruise.

2. It was held that *arming the vessel itself within the jurisdiction* was essential to guilt, and that any project for the cruiser that proposed to take out her armament, her munitions, or her men by separate bottoms, like the Alar, or the Hercules, or the Bahama, or the Laurel, or the Prince Alfred, was not within the penalties of the law. These supply-vessels, in turn, were safe under the law, as *they* were not intended "to cruise or commit hostilities against" the United States. Indeed, under this construction of the act, there seemed to be nothing to prevent the intended cruiser from taking in tow the tug which had its armament, its munitions, and its men, for transshipment on the high seas. For this purpose would, if proved, *demonstrate* that the cruiser had not taken,

[1] Page 35. [2] Page 37.

and did not propose to take, any armament, &c., within the jurisdiction, and that the tug was coming back, and had no "intent to cruise or commit hostilities."

3. It was constantly enjoined by the Government upon all officials, that they must be extremely careful not to *attempt* to interfere with the freedom of these suspected enterprises, *unless* they had in hand volunteer evidence sufficient to secure success; for, otherwise, they and their superiors would be exposed to heavy damages for failure.

4. It was made very prominent that demonstration of the warlike build or fitness of the cruiser would not procure a forfeiture without satisfactory proof, *in advance of any act*, of the conscious intent to which a jury could not shut its eyes. It was then held that, when the *intent* was made manifest by the inception of the cruise, as on the trial of the Florida at Nassau, no conviction could take place, because the warlike build and fitments having occurred in the home port of Liverpool, and the demonstration of intent in a colonial port, the actual cruise must be suffered to go on unimpeded. When, however, the principal law-officers of Her Majesty's Government attempted to reform this administration of the law, the principle that the full-blown consummation of the enterprise, by the cruiser's taking the seas under a commission, protected it from any further judicial scrutiny, barred all further proceedings.

We offer to the attention of the Arbitrators some extracts from official papers relating to the cases of the Oreto (or Florida) and Alabama, as instances of the system of the administration of the Foreign Enlistment Act of which we are now complaining, and which we also conecive to furnish a fair illustration of the general ineffectual nature of the action and result in all the attempts to enforce it.

On the 16th of June, 1862, the question being upon the seizure of the Oreto at Nassau, Governor Bayley wrote to Commander Hickley, in part as follows:

> The Oreto, as you are aware, has, in deference to your remonstrances and my orders, discharged her cargo of shell, shot, and ammunition, and is ready to clear in ballast. She has thus divested herself of the character of an armed vessel leaving this port for belligerent purposes. I do not think it consistent with law or public policy that she should now be seized on the hypothesis that she is clearing out for the purpose of arming herself as a vessel of war beyond the limits of the harbor. We have done our duty in seeing that she does not leave the harbor equipped and prepared to act offensively against one of two belligerent nations, with each of whom Great Britain is at peace.
>
> And if she has still any such intention, an intention which cannot be fulfilled within the harbor, I think this could be effectually thwarted by giving instructions that the vessels which are supposed to be freighted with her arms, and to be prepared to go out with her, should not leave the harbor within forty-eight hours after the Oreto has left it.[1]

On the 21st of June, 1862, Governor Bayley, after detailing certain incidents which had taken place in regard to the Oreto (Florida) at Nassau, thus reported to the Duke of Newcastle:

> 7. Throughout these occurrences I was averse from proceeding to extremities. Not that I considered the conduct of the Oreto to be entirely free from suspicion, or indeed from discourtesy to a neutral government. But I was unwilling to assume a hostile air; and, moreover, I felt that, however suspicious appearances were, it might be exceedingly difficult to bring either the Oreto or her crew within the scope of the Foreign Enlistment Act.
>
> 8. But when, having been several times dissuaded by me from seizing the vessel, and having, after seizure, released her in deference to my views, Captain Hickley, in his letter of 16th June, reiterated the expression of his professional opinion, not only that the Oreto was equipped as a vessel of war, but that she could be made ready for battle with the enemy in twenty-four hours; that other vessels then in the harbor could steam out with her, and help to arm her within a few miles off this port; and

[1] Brit. App., vol. i, pp. 24, 25.

that her real destination was openly talked of, I thought that a strong *prima-facie case* was made out for a judicial investigation, even although the evidence were insufficient to warrant her condemnation. And I thought it better to sanction an appeal to the law in favor of our neutrality, and in deference to the honest convictions of a gallant and experienced officer, than to allow the Oreto to leave our shores unchallenged and unobstructed on an expedition of pillage, piracy, and destruction.

9. These reflections were strengthened by others. I felt that if the Oreto were allowed to take in arms, ammunition, and a crew here, a similar impunity must be in future conceded to any other vessel belonging to either of the two belligerent states. The consequences of dealing out this even-handed justice would, in the existing state of popular feeling, be highly inconvenient and embarrassing. The boon obtained by a Confederate vessel would be claimed by a Federal vessel. If granted, it would be granted grudgingly and sulkily, and it was more likely that it would not be granted at all; hence would arise disputes, jealousies, and angry altercation. More than this, we have reason to believe that armed Federal vessels are lying at a very short distance from this port. * * * The refusal to accord to northern vessels the same indulgence which has been accorded to those of the South, might, under these circumstances, provoke an affray between the ships of the two contending federations, and involve, not only this colony, but even the mother country in a very serious collision.

12. Your Grace will see that it is easy to do very much in the way of equipping a vessel for hostile purposes, arming her, and enlisting a crew, without establishing a case of such strong testimony as would justify her condemnation by a court of competent jurisdiction; and although it is repugnant both to our policy and our sense of justice to strain the letter of the law, even on the side of a reasonable inference against the rigid rules of technical evidence, yet it is easy to see that a strict adherence to these rules may be suspected to be the result, and may produce the fruits, of a deliberate collusion with the enemies of a State on terms of amity with our own country.[1]

On the 30th of June, 1862, the evidence in regard to the Alabama being under consideration, Mr. Hamel, Solicitor of Customs, thus reported to the Commissioners of Customs:

The officers ought not to move in the matter without the clearest evidence of a distinct violation of the Foreign Enlistment Act, nor unless at a moment of great emergency, the terms of the Act being extremely technical, and the requirements as to intent being very rigid. It may be that the ship, having regard to her cargo as contraband of war, might be unquestionably liable to capture and condemnation, yet not liable to detention under the Foreign Enlistment Act, and the seizors might entail upon themselves very serious consequences.[2]

On the 11th of July, 1863, Consul Dudley's letter in regard to the Alabama being under consideration, Mr. Hamel, Solicitor, thus advised the customs:

There is only one proper way of looking at this question. If the Collector of Customs were to detain the vessel in question, he would, no doubt, have to maintain the seizure by legal evidence in a court of law, and to pay damages and costs in case of failure. Upon carefully reading the statement, I find the greater part, if not all, is hearsay and inadmissible, and as to a part the witnesses are not forthcoming or even to be named. It is perfectly clear to my mind that there is nothing in it amounting to *prima-facie* proof sufficient to justify a seizure, much less to support it in a court of law, and the Consuls could not expect a Collector to take upon himself such a risk in opposition to rules and principles by which the Crown is governed in matters of this na ture.[3]

On the 24th of July, 1862, after the Florida had been seized at Nassau on account of the "due diligence" of Commander Hickley, Vice-Admiral Milne thus wrote to the Secretary of the Admiralty:

I abstain from giving effect to my first intention, which was to express to Commander Hickley my approval of the zeal displayed by him on this occasion, in giving proof that our neutrality between the belligerents was a reality, and that when the occasion offered, Her Majesty's officers were quite ready to accept the responsibility of acting as in this case, wherein it appeared to be notorious, however incapable of legal proof it may turn out to be, that the vessel in question was fitted out in a British port as an armed Confederate cruiser.

Should the Law Officers of the Crown be of opinion that the seizure was illegal; that the very grave suspicion of being intended for employment as a Southern cruiser; the

[1] Brit. App., vol. i, pp. 13, 14.
[2] Brit. App., vol. i, p. 183.
[3] Ibid., p. 187.

fact of the vessel being fitted in every respect like one of Her Majesty's ships, and specially adapted for war; her armament ready to be put on board, with a crew of fifty men, and officers of the Confederate States ready to command her; should these facts be insufficient, in their opinion, to justify legally and technically the seizure, I yet trust their Lordships will see fit to exonerate Commander Hickley from all blame and consequent responsibility.[1]

On August 23, 1862, the Home Government having thought it desirable to send some Custom House Officers from Liverpool to Nasau, who could there give evidence of the facts which had taken place at Liverpool in regard to the Florida, Collector Edwards thus closes a letter to the Commissioners of Customs:

I am satisfied that she took no such [warlike] stores on board, and indeed it is stated, though I know not on what authority, that her armament was conveyed in another vessel to Nassau. The Board will, therefore, perceive that the evidence to be obtained from this port will all go to prove that she left Liverpool altogether unarmed, and that while here she had in no way violated the law.[2]

On the 11th of August, 1862, Governor Bayley, reporting the release of the Oreto, wrote to the Duke of Newcastle in part as follows:

I do not think it likely that we shall ever obtain stronger proof against any vessel than was produced against the Oreto, of an intention to arm as a belligerent. Therefore we may assume that no prosecution of the same kind will be instituted, or, if any be instituted, that it will fail. The natural consequence will be that many vessels will leave England partly equipped as men-of-war or privateers, and intended to complete their equipment here. But the notoriety of this practice will induce Federal men-of-war to frequent these waters, and virtually blockade the islands, in greater force than they have hitherto done; and when they are assembled in numbers, it will be vain to reckon on their observing any respect for territorial jurisdiction or international usage. I should neither be surprised to see Federal ships waiting off the harbor to seize these Confederate vessels, nor to see the Confederate ships engaging with Federal men-of-war within gunshot of the shore. The only means of preserving the peace and neutrality of these waters will be afforded by the presence of an adequate naval force.[3]

On the 23d of September, 1862, Governor Bayley reported in part as follows to the Duke of Newcastle:

I have the honor to inform your Grace that the Oreto, after her liberation by the admiralty court, left this harbor three or four weeks ago; and that she is supposed to have since been finally transferred to the service of the Confederate States. If that is so, she is entirely out of my jurisdiction, and I could no more legally seize her were she to re-enter the port than I could seize any man-of-war belonging to the Government of the United States.[4]

5. Another marked trait of the actual administration by her Majesty's Government of the *punitive* features of the Foreign Enlistment Act, is their failure in the clearest cases to *enforce* a forfeiture. When we consider that the pretensions of efficiency in this act are confessedly put upon its terrors to evil-doers and the dissuasion from illegal projects to be thus accomplished, it is with the greatest surprise that we find *credit* claimed for the British Government for the losses and sacrifices which that Government sustained in its purchases of its own peace from its law-breaking subjects by payment of damages, by *agreement*, for the prosecution of the Alexandra, and by payment in full for the Laird rams, instead of persisting in their forfeiture. Not more intelligible is the claim of *credit* for the course of the Government in the case of the Pampero, where the forfeiture was admitted by the claimants, but was never brought to an actual sale, which would inflict the loss of its value upon the guilty projectors of its intended cruise. Certainly, the British Government accomplished the *detention* both of the Pampero and of the Laird rams, and the United States have never omitted to express their satisfaction at this real benefit which they received from the success of

[1] Brit. App., vol. i, p. 29.
[2] Ibid., p. 34.
[3] Ibid., p. 75.
[4] Ibid.

Her Majesty's Government in these instances. But, that the punitive terrors of this act should have lost the example of actual forfeiture to the Rebel resources, or to the guilty British ship-builders, of the great value invested in them, and that the British Government should have refunded the money, exhausted by the guilty enterprise of the Laird rams, in season for its new use by the Rebel agents and their accomplices in the same illegal service, can never seem to the United States a valuable contribution to the efficiency of the Foreign Enlistment Act as an instrument of *punishment* of these proscribed and dangerous proceedings.

These various traits in the actual dealing of Her Majesty's Government with the Foreign Enlistment Act as an instrument, and as its only instrument, for maintaining its neutral obligations to the United States, became as well known, and were as clearly appreciated by all Her Majesty's subjects, and through all her imperial dominions, as if they had been announced by a Queen's Proclamation. No wonder that a learned judge of one of Her Majesty's superior courts declared that a whole fleet of ships of war could be driven through the statute! That, as matter of fact, a whole fleet of ships of war was driven through that statute, is in proof before this Tribunal.

British reliance upon the Foreign Enlistment Act a failure of due diligence.

Upon the whole proofs, then, and in their application to the cases of all the offending vessels, we confidently submit to the Arbitrators, that the Foreign Enlistment Act, as construed and administered, was not an adequate instrumentality for, and its actual employment by the Government did not amount to, the use of "due diligence to prevent" the violations of the international obligations of Great Britain to the United States, which are now under review.

We have never been able to appreciate the practical difficulties in preventing the emission of these hostile vessels from British ports. They were a long time in course of construction; they were long under the actual notice of the Government; its apparatus and resources for the fulfillment of the required duty were deliberated upon, explored, and understood. In truth, no practical difficulties did exist. But, whether or no this plain and easy execution of the practical duty itself could not become uncertain, difficult, and even impossible, by the adoption of theories and methods and agencies which, framed only *diverso intuitu*, naturally ended in failure, is a very difficult question. These constant failures were never from ignorance, from accident, or misfortune. They were not like the failures which may happen under any Government, where remoteness of ports, impediments of communication, obscurity, and insignificance of the projects and the vessels themselves, give opportunity for concealment and surprise. Such are the instances industriously collected in the British Case and Counter Case from the earliest years of the existence of the Government of the United States, and again in the period of the Spanish-American and Portuguese-American hostilities. The situations are very dissimilar; the conduct of the British Government here, and of that of the United States at those early periods, proceed upon very different systems; the causes of failure, as bearing upon responsibility therefor, are entirely distinct.

It is quite agreeable to be relieved from puzzling over the complexities, and delicacies, and obstacles which seemed to embarrass Her Majesty's Government, under Earl Russell's management of this international duty, in reference to so simple a matter as arresting these great ships of war, the Florida, the Alabama, the Georgia, and the Shenandoah, by the frank and practical view of the duty and the task ex-

pressed by Earl Granville, in Parliament, in the debate on the Washington Treaty. Earl Granville said:

On the one hand, nothing is so easy as to prevent a vessel of the Alabama class escaping from our shores, and the only loss to the country which would result from such a prevention, would be the small amount of profit which the individual constructing and equipping the vessel might derive from the transaction, which in almost every case is contrary to the Proclamation of the Queen. [1]

Nor are we able to see how Her Majesty's Government can escape from the dilemma which, on its failure to stop the Florida and the Alabama, and its easy success in stopping the Laird rams, was proposed to it by Sir Hugh (now Lord) Cairns, in Parliament.

What will you say to the American Minister now? Do not you suppose that the American Minister will come to you and say, "You told me last year that unless you had a case for seizure, and proof by proper evidence, you could not arrest a ship at all; that you could not detain her? Although you admitted that the facts I brought before you created very great suspicion, you said that you could not seize the Alabama, therefore you could not touch her. But look at what you did in September. For a whole month you detained these steam-rams in the Mersey, while, according to your own words, you were collecting evidence, and endeavoring to see whether your suspicions were well founded." * * I maintain that when the United States hold this language, either our Government must contend that what they did in September was unconstitutional, or they ought to have done the same with regard to the Alabama, and are liable. [2]

V. Manifestly, if the Foreign Enlistment Act of Great Britain was thus inadequate and unsuitable, as an efficient instrument in the hands of the Government for the fulfillment of its international duty to the United States, it was a failure in the "use of due diligence to prevent" the injuries now complained of, not to obtain from Parliament a suitable and efficient act for the fulfillment of the duty. The demonstration of the existence of this obligation, and of its being early brought to the notice of Her Majesty's Government by the United States, and of the refusal of Great Britain to meet the obligation, is complete. We refer the Tribunal to a statement of the contemporary correspondence on this subject between the Governments, and a memorandum of the action of Great Britain in the matter, *after* the close of the Rebellion, contained in Note C of the Appendix to this Argument.

The neglect to amend the Foreign Enlistment Act a failure of due diligence.

In strong contrast with this inaction of Great Britain, and with its justification by Her Majesty's Government, is the course taken by the Government of the United States in 1793, at the instance of Great Britain, in 1817, at the instance of Portugal, and again in 1838, to meet an exigency in the interest of Great Britain, for the maintenance of its sovereignty over the Canadian provinces.

Contrast between the course of Great Britain and the course of the United States in these respects.

On the 3d of December, 1793, President Washington, in his message to Congress, after stating the means that he had used to maintain a strict and impartial neutrality, said:

It rests with the wisdom of Congress to correct, improve, or enforce this plan of procedure, and it will probably be found expedient to extend the legal code and jurisdiction of the courts of the United States to many cases which, though dependent upon principles already recognized, demand some further provisions.

When individuals shall, within the United States, array themselves in hostility against any of the powers at war, or enter upon military expeditions or enterprises within the jurisdiction of the United States, or where penalties on violations of the law of nations may have been indistinctly marked or are inadequate, these offenses cannot receive too early and close an attention, and require prompt and decisive remedies.

[1] Appendix to this Argument, Note B.

[2] Am. App., vol. v, p. 493.

On the 20th of December, 1816, the diplomatic representative of Portugal thus wrote to Mr. Monroe, then Secretary of State:

> What I solicit of him (the President) is the proposition to Congress of such provisions by law as will prevent such attempts for the future.[1]

Six days later, President Madison addressed a message to both Houses of Congress in part as follows:

> With a view to maintain more effectually the respect due to the laws, to the character, and to neutral and pacific relations of the United States, I recommend to the consideration of Congress the expediency of such further legislative provisions as may be requisite for detaining vessels actually equipped, or in course of equipment, with a warlike force, within the jurisdiction of the United States; or, as the case may be, for obtaining from the owners or commanders of such vessels adequate securities against the abuse of their armaments.[2]

At the same time, Mr. Monroe, Secretary of State, wrote to Mr. Forsyth, chairman of the Committee on Foreign Relations:

> I have now the honor to state that the provisions necessary to make the laws effectual against fitting out armed vessels in our ports for the purpose of hostile cruising, seem to be:
>
> 1st. That they should be laid under bond not to violate the treaties of the United States under the law of nations, in all cases where there is reason to suspect such a purpose on foot, including the cases of vessels taking on board arms and munitions of war, applicable to the equipment and armament of such vessels subsequent to their departure.
>
> 2d. To invest the Collectors, or other Revenue Officers, where there are no Collectors, with power to seize and detain vessels under circumstances indicating strong presumption of an intended breach of the law, the detention to take place until the order of the Executive, on a full representation of the facts had thereupon, can be obtained.
>
> The existing laws do not go to this extent. They do not authorize the demand of security in any shape, or any interposition on the part of the magistracyas a preventive, when there is reason to suspect an intention to commit the offense. They rest upon the general footing of punishing the offense merely where, if there be full evidence of the actual perpetration of the crime, the party is handed over, after trial, to the penalty denounced.[3]

The circumstances under which the temporary Neutrality Act of 1838 was passed, are fully stated in the Case of the United States, (p. 133,) and the act itself can be found in the documents presented therewith.[4]

Not less in contrast with the indifference and obstructions with which Her Majesty's Government met the earnest applications of the Government of the United States, in the stress in which it was placed, for an improvement of the Foreign Enlistment Act, are the solicitude and attention bestowed by Great Britain upon the amendment of this act *after* the rebellion was suppressed. The report of the Royal Commission, appointed to consider the subject, upon the defects of the old law and the necessary amendments to give it due vigor, leaves nothing to be said in condemnation of the persistency with which Great Britain clung to it during the whole period of the Rebellion. The promptitude of Parliament in enacting the new statute upon the breaking out of the recent war between Prussia and France, has already been referred to, and is exhibited in the extracts from the debate on its passage, set forth in Note B of the Appendix to this Argument.

It is unnecessary to argue that the passage of the present Foreign Enlistment Act in May, 1861, following upon the Queen's Proclamation of neutrality, and its reasonable enforcement, would have precluded the scandals deplored by the British Government and the injuries suffered by the United States from the emission of the Alabama and her consorts from British ports. The text of the act carries its own argument.

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[1] Am. App., vol. iii, p. 541.
[2] Ibid., p. 542.
[3] Ibid., p. 542.
[4] Ibid., vol. iv, p. 62.

Well might that eminent publicist, Phillimore, immediately after the passage of this act, "rejoice that the English Government has, by the statute of this year, strengthened the hands of the Executive, and given greater force and prominence to the maxim that, with respect to the external relations of the State, the will of the subject is bound up in that of his Government."[1]

We confidently submit that, in refusing to amend the Foreign Enlistment Act in aid of the fulfillment of the duty prescribed by the Three Rules of the Treaty, Great Britain failed "to use due diligence to prevent" the injuries for which the United States demand redress from the justice of this Tribunal.

VI. We pass now to an examination of the question of "the use of due diligence to prevent" the violation of its international duty to the United States, as exhibited in the course pursued toward the offending vessels by Great Britain, *after* their first escape from British ports, under the circumstances and consequences of inculpation for such escape which have already been considered. Except for the actual violence and depredations committed by the escaped cruisers after their emission from British ports, the injuries to the maritime property of the United States and the enormous connected losses to the national wealth would not have been inflicted. In every view, therefore, the subsequent career of the cruisers becomes of the highest importance to the practical determination by this tribunal of the matters in judgment before it.

Failure in due diligence after the escape of the cruisers.

1. It is indisputable, that if, in respect to any one of the vessels incriminated, the escape of that vessel from the home port should have been shown by Great Britain, to the satisfaction of the Tribunal, to have taken place *in spite* of "the use of due diligence to prevent" it, the principles of the Three Rules and of international law not inconsistent therewith will require that the same inquisition must be applied to any subsequent escape from another port of the British Empire, home or colonial, where the Government had an opportunity to lay hands upon and arrest her.

In not detaining offending cruisers when again in British ports, a want of due diligence.

Thus, suppose, for a moment, that the British Government was not in fault in respect of the first emission of the Florida from the port of Liverpool, her subsequent history at Nassau must then be examined. If her openly allowed departure from Nassau, "on an expedition of pillage, piracy, and destruction," (to quote Governor Bayley again,) was not *in spite* of the use of due diligence "to prevent the departure from its jurisdiction" of a vessel which had "been specially adapted in whole or in part within such jurisdiction to warlike use," such departure is, in itself, a failure by Great Britain to fulfill the duties set forth in the Three Rules of the Treaty, and must be so pronounced by the Tribunal. As the Florida, until after she left Nassau, remained in the same plight of a British vessel as when she left Liverpool, and did not receive a (so-called) "commission," or change her flag until afterward, there is no opportunity for cavil upon this point.

2. If, on the other hand, the original escape of any of the offending vessels from the home port shall inculpate Great Britain under the Rules of the Treaty, it is obvious that the original fault and accountability of Great Britain in the supposed case only enhance the obligation which, we have seen, requires "the use of due diligence to prevent" the subsequent departure from its jurisdiction of a vessel whose original escape from the home port has *not* been imputed to a default in such diligence.

[1] Phill. Int. Law, (ed. 1871,) p. 28, preface.

3. This obligation, whether in the alternative of the original escape of the offending vessel being for want of, or in spite of, the "use of due diligence to prevent" it, must endure until it has been fully and successfully met by the arrest and detention of the offending vessel, and her "expedition of pillage, piracy, and destruction" brought to a close.

This obligation not determined by commissioning a cruiser.

We have already considered whether this indisputable general proposition needs to be qualified by the impediment insisted upon to its continued application, arising from the (so-called) "commission" as a public ship of a *belligerent not recognized as a nation or a sovereign*.[1] We have shown that, in regard to public ships of recognized nations and sovereigns, this public character by comity withdraws them only from the jurisdiction of courts and process, and leaves them amenable to the political and executive power. We have shown that, in the case of public ships having *no* recognized state or sovereign behind them, the political and executive power deals with them, in its own discretion, with strong hand, in administration of every duty and every right pertaining to itself or owed to another nation. The grounds upon which we put our inculpation of Great Britain for dealing with these Rebel cruisers, as it did, *after* their commission as public ships, do not involve any contention as to whether or not *judicial* control should thereafter have been asserted over them. This domestic question of comity to the Rebel cruisers on their "expeditions of pillage, piracy, and destruction," may be at the discretion of a Government. But the pretensions that the international duty by which Great Britain was "bound" to the United States to use due diligence to prevent these offending vessels of guilty origin from departing from its ports when it was master of the opportunity so to do, was cut short and overmastered by the Rebel "commission," upon the reasons already given, we entirely deny.

Not excluding escaped cruisers from British ports was a want of due diligence.

4. It is conspicuous upon the proofs before the Tribunal that it was quite in the power of Her Majesty's Government, by arresting these offending vessels at their first, or even later, visits to British ports *after* their successful fraud upon the neutral obligations of Great Britain in their original "escape," to have intercepted these "expeditions of pillage, piracy, and destruction," and at once repaired the misfortune or the failure of duty which had made such "escape" possible, and struck a fatal blow at the systematic project and preparation of such expeditions from the home ports of Great Britain. There was no adequate motive for, or benefit from, these guilty enterprises if the first escape were to leave the vessels homeless and shelterless upon the ocean, with no asylum in British ports except such as mere humanity offers against stress of storm and danger of shipwreck. Such asylum, upon the very motive on which it is yielded, upon the very plea upon which it is begged, the sentiment of humanity, would have exacted the abandonment of the career of violence, meditated or commenced, and a submission to the outraged authority of Great Britain, whose peace and dignity were compromised by the original escape from its ports.

It is a notable fact that not one of these offending vessels ever returned to a home port of Great Britain, except the Georgia, to be dismantled and sold, and the Shenandoah to be surrendered to the Government of the United States. The Florida once, and the Alabama once, sought the commercial recruitment which the hospitality of the ports of France conceded them, on the plea of *relâche forcée*. They had not violated the neutrality of France in their original outfit, and had no resent-

[1] *Supra*, pp.

ments or restraints to fear in her ports. But why prefer France to England? Was it on motives of market and convenience? The supplies for these cruisers while in the French ports were sent to them from England. Every interest, every inclination, every motive would have carried them to England, had not some overwhelming reason deterred them from that resort. They had violated her neutrality; they had brought scandal and reproach upon the administration of her laws. They were not lacking in courage or effrontery; but that the government of Great Britain would tolerate their presence in her ports to replenish their resources, and "their expeditions of pillage, piracy, and plunder," was impossible to be conceived, and they avoided the danger. But the wide power of that nation "whose morning drum-beat, commencing with the sun and keeping company with the revolving hours, surrounds the whole earth with one continuous strain of the martial airs of England," does not outrun the obligations of public justice or of international duty. What it would shock the moral sense of Englishmen to deny must have been the action of Her Majesty's Government at home, should have been, but was not, their action throughout their colonial possessions.

On the 26th day of April, 1864, in the debate in the House of Lords on the dispatch of the Duke of Newcastle to Governor Wodehouse, instructing him that he should have detained the Tuscaloosa, Earl Russell, defending this instruction, said in part as follows:

> It must be recollected that all these applications of principles of international law to the contest between the Federal and so-styled Confederate States, have to be made under very exceptional circumstances. It has been usual for a Power carrying on war upon the seas to possess ports of its own in which vessels are built, equipped, and fitted, and from which they issue, to which they bring their prizes, and in which those prizes, when brought before a court, are either condemned or restored. But it so happens that in this conflict the Confederate States have no ports, except those of the Mersey and the Clyde, from which they fit out ships to cruise against the Federals.[1]

In the same debate, the Attorney General, Sir Roundell Palmer, also defending the dispatch, in addition to the words we have quoted *supra*, said:

> By the mere fact of coming into neutral territory, in spite of the prohibition, a foreign Power places itself in the position of an outlaw against the rights of nations, and it is a mere question of practical discretion, judgment, and moderation, what is the proper way of vindicating the offended dignity of the neutral sovereign.[2]

In February, 1864, Mr. Vernon Harcourt thus wrote in a letter to the London Times:

> I think that to deny to the Florida and to the Alabama access to our ports would be the legitimate and dignified manner of expressing our disapproval of the fraud which has been practiced upon our neutrality. If we abstain from taking such a course, I fear we may justly lie under the imputation of having done less to vindicate our good faith than the American Government consented at our instance, upon former occasions, to do.[3]

On the 13th of May, 1864, in a debate relative to the course that should be adopted in regard to the Georgia which had come into Liverpool, the Attorney General said:

> I have not the least doubt that we have a right, if we thought fit, to exclude from our own ports any particular ship or class of ships, if we consider that they have violated our neutrality.[4]

In 1867, Her Majesty's Commissioners having been empowered to report what changes ought to be made in the Foreign Enlistment Act for

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[1] Am. App., vol. v, p. 535.
[2] Ibid., p. 570.
[3] Ibid., vol. iv, p. 204.
[4] Ibid., vol. v, p. 583.

the purpose of giving it increased efficiency and bringing it into full conformity with international obligations, all joined in this report:

> In time of war no vessel employed in a military or naval service of any belligerent which shall have been built, equipped, fitted out, armed, or dispatched contrary to the enactment, should be admitted into any port of Her Majesty's dominions.[1]

That these are not extreme or disputed propositions, is evident from the concurrence therein of Lord Cairns, Baron Bramwell, Sir Roundell Palmer, and Mr. Gregory, as well as Dr. Phillimore, Mr. Vernon Harcourt, Mr. Thomas Baring, and Mr. Forster.

On the 4th of August, 1870, in the House of Commons, the attorney-general, Sir R. P. Collier, having reference to the omission, from the Foreign Enlistment Act, of a clause carrying out the report above cited, said:

> He had to explain that, although the Royal Commissioners made a recommendation to the effect of this clause, they did not intend that it should be embodied in an act of Parliament, but that it should be carried out under the Queen's regulations. The Governor of a Colony would, under this clause, have to determine whether a ship entering his port was illegally fitted out or not, and this was enough to show the object the commissioners had in view could not be carried out by an Act of Parliament. It was intended instead to advise Colonial Governors of the escape of any illegally fitted vessels.[2]

Thus it appears that Her Majesty's Government fully recognizes the power of the Royal Prerogative to exclude from British ports any vessel or class of vessels which has violated its neutrality. Brazil, when the occasion for the exercise of this right was presented, considered it equally a duty, and issued and executed her order, for the exclusion of the Alabama and Shenandoah from any port of the Empire.[3]

Probably, the suppression of the maritime hostilities, from which the United States have suffered, would have followed from the milder measure of proscription from British ports, enforced by arrest and detention, if the prohibition was transgressed. The lead thus taken by Great Britain would naturally, if not necessarily, have been followed by the other powers whose possessions afforded a casual and infrequent resort for the offending vessels. Following, at greater or less interval, as they had, the recognition of belligerency declared by Great Britain, these powers would have admitted the common duty of neutrals, in the peculiar situation of maritime hostilities presented, to accept the denunciation by Great Britain of the escaped vessels as *outlaws* and not belligerents, and denied them further hospitality.

5. Certainly, in the absence of such proscription, it would seem necessary that some representations should have been made by Her Majesty's Government to the persons with whom it was in the habit of communicating as, in some sort, accredited by the Rebel organization for such purpose, concerning the flagrant violations of neutrality in which Great Britian was involved, by the system of operations of the Rebel agents heretofore brought to the notice of the Tribunal.[4]

The representations to insurgent agents respecting these cruisers were so long delayed and so feeble as to amount to want of due diligence.

The Arbitrators will search the British Case and Counter Case, and the body of their appended proofs, in vain, for the least intimation of such representations. But we are not left to inference based upon this state of the evidence. In the American Appendix will be found certain correspondence between Earl Russell and Mr. Mason, (then permanently resident in London,) which exhibits an entire unconcern in

[1] Am. App., vol. iv, p. 82.
[2] See Appendix to this Argument, Note B.
[3] *Supra*, p. 17, sec. viii.
[4] Am. App., vol. vii, p. 113.

the mind of Her Majesty's Foreign Secretary at the time the escape of the Alabama was a fresh incident at home, and the dealing with the escaped Florida by the colonial authorities at Nassau was under the notice of the Home Administration. During the very period of these two matters of the Florida and the Alabama, which Earl Russell subsequently stigmatized in Parliament as "a scandal and a reproach" to England, a correspondence between the Foreign Secretary and Mr. Mason was in progress, in which the most friendly tone and topics prevailed. This correspondence begins with July 17, and terminated with a letter of Earl Russell, August 2, 1862. This, it will be noticed, runs through the time of the deliberations of the British Government as to the arrest of the Alabama, and beyond the consummation of her successful evasion from Liverpool. But not a word on the subject is found in the correspondence.[1]

Again, at the end of the year 1864, another correspondence between the same writers took place, and that nothing of expostulation or resentment, or exaction of redress for these continuing outrages, finds place in it, may be well inferred from the manner in which Mr. Slidell feels justified in commenting to Mr. Benjamin, of the Confederate Cabinet, upon Earl Russell's concluding letter:

> His Lordship voluntarily went out of his way to say the most disagreeable thing, possible to the Northern Government; his reference to the Treaty of 1783 will, I think, be especially distasteful to them, placed in connection with his twice-repeated recognition of the separate existence of the North and South, as never merged in a single nationality. I should be much surprised if this letter does not call forth a universal howl against his Lordship from the Northern press.[2]

That Her Majesty's Government could promptly, and without enfeebling courtesy, discharge this duty of remonstrance to a belligerent against supposed or intended violations of its neutral obligations, is demonstrated by the correspondence of Earl Russell with Mr. Adams in regard to some matters which seemed to Her Majesty's Government to require explanations from the United States.

On the 30th of November, 1863, Earl Russell thus wrote to Mr. Adams in part as follows:

> I have the honor to call your attention to the following statements, which have come to the knowledge of Her Majesty's Government, respecting the shipment of British subjects on board the United States ship of war Kearsarge, when in the port of Queenstown, for service in the Navy of the United States.
>
> I need not point out to you the importance of these statements, as proving a deliberate violation of the laws of this country, within one of its harbors, by commissioned officers of the Navy of the United States.
>
> Before I say more, I wait to learn what you can allege in extenuation of such culpable conduct on the part of the United States officers of the Navy, and the United States Consul at Queenstown.[3]

On the 31st of March, 1864, Earl Russell wrote to Mr. Adams as follows:

> I have the honor to bring to your notice an account, taken from a newspaper, of what passed at the trial before Mr. Justice Keogh of the British subjects indicted for having taken service in the United States ship Kearsarge, at Queenstown, in violation of the provisions of the Foreign Enlistment Act; and, with reference to the correspondence which has passed between us, I have the honor to request that you will inform me whether you have any explanations to offer on the subject.[4]

On the 9th of April, 1864, Earl Russell, writing to Mr. Adams, said:

> I transmit to you herewith extracts from a deposition of one Daniel O'Connell, by

[1] Am. App., vol. ii, pp. 416–426.
[2] Am. App., vol. i, p. 619.
[3] Ibid., vol. ii, p. 421.
[4] Ibid., p. 442.

which you will perceive that he was examined and sworn before, or with the knowledge of, officers of the United States ship of war Kearsarge, and furnished with the uniform of a United States sailor.

I know not how these circumstances, occurring on board a ship of war, can have taken place without the knowledge of the captain of the vessel.[1]

So, too, Her Majesty's Government did find occasion and opportunity to address its first remonstrance on the subject of these violations of neutrality to the persons with whom it was in the habit of treating as representatives of the Rebel organization. This was February 13, 1865, just two months before the final overthrow of the Rebellion and the surrender of Richmond. We append the opening and concluding paragraphs of this remonstrance. They form part of the letter from which important citations have been made in this argument, and a considerable extract from which is placed at the head of part v, of the case of the United States. By that extract it appears that "the unwarrantable practice of building ships in this country to be used as vessels of war against a state with which Her Majesty is at peace" was still continued, and formed a main subject of the remonstrance. We quote from Earl Russell's letter:

It is now my duty to request you to bring to the notice of the authorities under whom you act, with a view to their serious consideration thereof, the just complaints which Her Majesty's Government have to make of the conduct of the so-called Confederate Government. The facts upon which these complaints are founded tend to show that Her Majesty's neutrality is not respected by the agents of that Government, and that undue and reprehensible attempts have been made by them to involve Her Majesty in a war in which Her Majesty had declared her intention not to take part.

You may, gentlemen, have the means of contesting the accuracy of the information on which my foregoing statements have been founded; and I should be glad to find that Her Majesty's Government have been misinformed, although I have no reason to think that such has been the case. If, on the contrary, the information which Her Majesty's Government have received with regard to these matters cannot be gainsaid, I trust that you will feel yourselves authorized to promise, on behalf of the Confederate Government, that practices so offensive and unwarrantable shall cease, and shall be entirely abandoned for the future. I shall, therefore, await anxiously your reply, after referring to the authorities of the Confederate States.[2]

We find, too, that in March, 1865, hardly thirty days before the surrender of Richmond, the Colonial Governor at Nassau advised the home Government of the means that had, at last, been found to make the evasion of another Florida impossible. The Governor writes to Mr. Cardwell, a member of the Ministry, as follows:

I take this opportunity of mentioning that for some weeks past I have had a report made to me of every steam-vessel arriving in the harbor, with special notice of anything in the construction or equipment of any which differ from the ordinary blockade-runners, and the officers of customs are on the alert to detect and report any attempts to violate the provisions of the Foreign Enlistment Act.[3]

It is unnecessary to point to the conclusion which the Arbitrators must have anticipated, that these powers of remonstrance and these resources of vigilance, if resorted to in February and March, 1862, would have foreclosed the controversy now in judgment before the Tribunal.

It is easy to see how these manifold failures of Great Britain to fulfill its international duty to the United States led to the enormous injuries, as their necessary consequences, which have constituted the sum of the grievance which, at the close of the Rebellion, the United States had suffered from this friendly power.

By confining attention and efforts to questions of legal conviction for municipal offenses, and becoming helpless in the meshes of lawyers and courts, Her Majesty's Government saw the Florida and Alabama emitted

[1] Am. App., vol. ii, p. 448.
[2] Am. App., vol. i, pp. 630, 631.
[3] Brit. App., vol. ii, p. 589.

from British ports, while they were "watched" by Government officers and debated about by eminent lawyers, and made them but forerunners of like offenders. The domestic law protected their *evasion* and paralyzed the government's *prevention*, and the international obligation had no place or authority at that stage of the transaction. But the moment they were out they were protected in their "expeditions of pillage, piracy, and destruction" by the law of nations, which, it was said, compelled Great Britain to hold her hands, by reason of the respect which international *comity* inspires for the "commission" of even such cruisers.

It was true that this debility of municipal law, and this homage to comity, were wholly voluntary on the part of Great Britain. The one was curable by Parliament, and the other lay at the discretion of the Crown. But Her Majesty's Government, while the events were in progress, did not find adequate reasons for any action, notwithstanding the wide-spread depredations which these offending vessels were committing.

The British course in these respects voluntary.

There was one measure of restriction upon these depredations which Her Majesty's Government adopted and persevered in, we mean the exclusion of prizes of either belligerent from British ports. This ordinance was consonant with sound principles, and adopted and enforced in sincere good faith. But to this measure we can trace no real benefit in actually repressing the maritime hostilities. On the contrary, its most afflictive feature, the destruction of ships and their cargoes at sea, flowed from the circumstance that the rebels had no ports of their own which the naval power of the United States had not closed, and that their prizes were excluded from neutral ports. This was well pointed out by Earl Russell in parliament, in a passage already referred to.

Exclusion of prizes from British ports no benefit to United States.

It was for this reason that the well-meant exclusion of prizes from neutral ports gave to the rebel cruisers enlarged capacity for terror and for mischief, and shocked the civilized world with this spectacle of destructive violence. But the appeal that this consequence was a demonstration that maritime belligerency should never have been granted, and that the true remedy was to withdraw the concession, was not successful.

Under these two measures of homage to the rebel "commission," though it covered a Florida or an Alabama, and of acquiescence in the destruction of enemy's maritime property without adjudication, American commerce was ground to powder, as between the upper and the nether millstone.

Meanwhile no retaliation of prize capture or destruction as enemy's property was possible. The law of contraband and breach of blockade was the only weapon at the command of the United States against the fleet of blockade runners owned and navigated by the Rebel organization, but protected as neutral property by the British flag. This retaliation was, necessarily, submissive to the prize jurisdiction and to condemnation only upon special proofs. It was thus that the whole rebel naval warfare was prosecuted by cruisers of unlawful British outfit, protected by British recognition of the Rebel flag, while the whole Rebel commercial marine was protected by the cover of the British flag. So, too, no opportunity to shut up, or to capture, or to destroy, any vessel in port, was open to the Navy of the United States; every port accessible to such vessel was a neutral port, which the United States could neither blockade nor invade with their hostilities.

We have exposed these peculiar features of intolerable hardship to

The responsibility of Great Britain for these failures in due diligence continued until the end of the career of the cruisers.

the United States in these maritime hostilities, for the bearing they have upon the failure of Great Britain to fulfill its obligations under the Rules of the Treaty in refusing to arrest the offending vessels in its ports, or to exclude them therefrom, *after* their original outfit and escape. We confidently submit that the Tribunal will find in *this* ground of inculpation, (1) a substantive failure of "due diligence," in the sense of the Treaty, and (2) a maintenance of continued responsibility for "all claims growing out of the acts of" these vessels during their career to its end.

It will remain, then, for the Tribunal to consider these various propositions of law and of fact, under which the actual conduct of Her Majesty's Government is now to be judged, and to apply them, so far as they shall approve themselves to the enlightened judgment of the arbitrators, to the exact analysis of the evidence touching each offending vessel, in a previous division of this argument set forth. We gladly recognize the great advantages which the contending parties will derive from the practical and comprehensive estimate of the decisive elements of the controversy, which the experience and sagacity that belong to conversance with public affairs enable the arbitrators to bring to the determination of this controversy.

No evidence of the exercise of due diligence submitted by Great Britain.

We confidently submit that the British Government has not laid before the Tribunal *any* evidence tending to show the exercise of "due diligence," in respect of any one of the offending vessels, to *prevent* the occurrence of the violation of the international obligation imposed by the Three Rules of the Treaty. Indeed, we may safely go further and insist that, while the matters were *in fieri*, Her Majesty's Government did not at any time apply its thoughts or its purposes to the *direct prevention* of such violation. It was wholly engaged in considering what prosecutions for penalties and forfeitures under the Foreign Enlistment Act it could hopefully institute. For the reasons we have pointed out, *this* does not *tend to* make out "due diligence" to *prevent* the violation of the *international* obligation assigned by the Treaty.

A phrase in the first clause of the first Rule speaks of a neutral Government's duty being applicable to "any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a power with which it is at peace." What attention was ever paid by Her Majesty's Government, in its deliberations, its doubts, and its decisions, about arresting a vessel, to *this* broad criterion? We look in vain for the agitation of any such question in either of its elements, (1) of the subject of belief, or (2) the grounds required to support it. Instead, the whole topic of debate, of advice, and of determination before Her Majesty's Government was (1) of belief that a forfeiture of the vessel could be obtained under the Foreign Enlistment Act, and (2) the support required for such belief was to be *sworn* voluntary evidence in hand sufficient to exclude appreciable risk of failure before a jury and consequent damages. Whenever the United States shall have submitted by Treaty to *this* test of the international obligations of Great Britain, it will be time enough to adjudge the cause by it.

We respectfully submit that there is nothing in the evidence, or argument even, which proves or asserts that the British Government was either without reasonable ground to believe, or did not believe, that the Florida or Alabama at Liverpool, or the Florida on her first visit to Nassau, was not intended to cruise against the United States. The only deliberation and doubt were, as to the prosecution under the foreign-enlistment act offering the means of judicially punishing, and so, incidentally, interrupting, the projected enterprise.

So, too, we confidently submit to the Tribunal that it does not appear on evidence or in argument before the arbitrators that Her Majesty's Government professes or claims to have used "due diligence" within the premises of the Three Rules of the Treaty, unless due diligence to enforce forfeitures and punishments under the Foreign Enlistment Act is equivalent to due diligence to prevent the violation of the international obligation to the United States which is exacted by the Treaty. We have already considered this subject in some detail, but we apprehend that the wide distinction between these two propositions is too plain to require any further emphasis than its statement. All the laborious argument and voluminous evidence to prove due diligence in prosecutions under the Foreign Enlistment Act are but an "*imbelle telum*" against our challenge of due diligence as exacted by the treaty. An illustration of the difference between these two objects and measures of due diligence is presented upon the occurrences of the Florida's first visit to Nassau. Here we have a legal trial of the question whether the forfeiture of the Florida could be obtained under the foreign-enlistment act in the Vice Admiralty Court. This issue was held to exclude all evidence of what had made her a vessel of war before she left Liverpool, and to include only the question of warlike equipment in Nassau as cognizable by the local court. The Vice Admiralty Court held that the evidence did not prove enough within this issue to forfeit the vessel, and judgment was given against the Crown. So much for this disposition of the question of private right involved in this trial in Admiralty.

But Sir Alexander Milne, and Commander Hickley, and Commander McKillop, and other naval officers, concurred in thinking that their duty, and the duty of Her Majesty's Government, required the *prevention*, by strong hand, of the departure of the Florida. Accordingly, Commander Hickley seized her, and Sir Alexander Milne found a warrant for such action in "the very grave suspicion of being intended for employment as a Southern cruiser; the fact of the vessel being fitted in every respect like one of Her Majesty's ships, and especially adapted for war; her armament ready to be put on board, with a crew of fifty men, and officers of the Confederate States ready to command her."[1]

This action, we submit, was such as the facts of the case required to meet the due diligence of the Three Rules of the Treaty. But the maintenance of the Foreign Enlistment Act was suffered to measure and control the international duty of the Government, and the only question left was, whether Commander Hickley should be protected from "blame and consequent responsibility" for his seizure.[2]

In the light of the propositions which we have insisted should govern the examination, we find it impossible to discover, in the proofs exhibiting the conduct of the British Government in respect of the offending vessels, any evidence tending to show the use of due diligence pointed at the fulfillment of the international duty exacted by the Treaty. Indeed, the fact that the Florida and Alabama *escaped*, when, as Lord Granville justly observed in the debate on the Treaty of Washington, "nothing is so easy as to prevent a vessel of the Alabama class escaping from our shores," is conclusive evidence in the absence of countervailing proof that the due diligence of the Treaty was *not* exhibited to prevent the escape. In vain shall we look for evidence of inevitable accident, of imposition, or of misfortune, supervening to thwart or surprise Her Majesty's Government and accomplish the offense, notwithstanding the employment of due diligence to prevent it.

[1] Brit. App., vol. i, p. 30. [2] Ibid., p. 30.

It has been more or less argued, or intimated, that in the escape of the Alabama from Liverpool, some element of accident or *casus* mixed itself with the transaction, and is to affect the judgment of the Tribunal in inculpating or exculpating Great Britain for her escape.

We will briefly examine this question of supposed accident or *casus*. The Alabama was the subject of attention to Her Majesty's Government, more actively and immediately, from the 23d day of June. The Law Officers on the 30th of that month state that it seemed "evident she must be intended for some warlike purpose," and refer to a statement of Lairds' foreman that the vessel was "intended as a privateer for the service of the Government of the Southern States," and advise that steps be taken by Her Majesty's Government "to ascertain the truth." On the same day the surveyor at Liverpool reports her warlike build, &c., and states the current report that she is built for a foreign Government, and that this is not denied by the Lairds, with whom he has communicated on the subject, but that they decline to answer questions as to her destination.

On the 9th of July, the Collector was informed that the Lairds had said the vessel was for the Spanish Government, but that the Spanish Minister gave a positive assurance that this was not true. On the 21st of July the Collector sent to London the affidavits in the case, with information that he had been requested to seize the vessel, and asked for instructions by telegraph how he was to act, "as the ship appeared to be *ready for sea, and may leave any hour she pleases.*"

Upon the 23d of July, the "extreme urgency" of the case was represented to the Government, and that "the gun-boat now lies in the Birkenhead docks ready for sea in all respects, with a crew of fifty men on board." On the 26th, the decision of the Government was urged, particularly as *every day* afforded opportunities for the vessel in question to take her departure." On the 28th, "she was moved from the dock into the river; the men had their clothes on board, and received orders to hold themselves ready at any moment." She remained in the river "until 11 or 12 o'clock of the 29th, and was seen from the shore by thousands of persons. The customs officers were on board when she left, and only left her when the tug left." As early as July 4 Her Majesty's Government had promised Mr. Adams that "the officers at Liverpool would keep a strict watch upon the vessel." *After* she left, Her Majesty's government gave orders to seize and detain her.

Here was a vessel under inquiry as to probable seizure for forfeiture, carrying the consequence of intercepting her illegal enterprise. She was ready to sail "at any hour," *six days* before she did sail; the Government made no inquiry, demanded no pledge, took no precautions, placed no impediments affecting her entire freedom. The Government was fully informed of the situation, and was entreated to take action. The Alabama had her enterprise before her, and the Government had its duty to defeat it. These objects and interests were repugnant. The Alabama, being wholly unimpeded by the Government, sailed before the arrest was ordered. The Government, knowing all about the situation, did not attempt to interfere with the vessel's movements.

We are not here arguing as to diligence or duty, only as to accident or *casus*. It is said that some fortuitous circumstance retarded the decision of the Government. But the Government were all the while aware that the Alabama could sail when she pleased, and that she was under the most powerful motives to anticipate the adverse action of the Government by sailing. Sail she did; and this may be put to the account of

casus, when pursuing an expected course, under adequate motives, and at the necessary time, is properly described as accidental.

Equally frivolous seems the only instance that is pretended of anything like *imposition* having been practised on Her Majesty's Government in the course of these transactions. The so-called imposition consists in second-hand statements, that the Florida—which was the counterpart of one of Her Majesty's gun-boats, had no storage, and was by no possibility "*ancipitis usûs*"—was not for the Confederate war service, but belonged to a firm of Thomas Brothers, of Palermo, in Sicily. Now, as this firm of British merchants established in Sicily had no recognition of sovereignty, or even of belligerency, it was very plain that this ownership of a war ship was as much a *cover* as John Lairds & Sons', or William C. Miller & Co.'s, would have been. Accordingly, inquiries were addressed for the purpose of learning whether a Government, also suggested as a possible owner of this war vessel, had really any interest in her, and they were answered in the negative.

The worthlessness, as hearsay, of this evidence is as apparent as its falsehood in respect to the fact, and we only recur to the matter as being the single instance of *imposition* which is claimed to have occurred in the long history of "the several vessels which have given rise to the claims generically known as the 'Alabama Claims.'"

In the deliberations of the Arbitrators, which are to guide them to their actual award, they will have occasion to consider the application of the second and third Rules of the Treaty, no less than of the first Rule, to all the situations and propositions of fact and of law that arise for decision. It is not necessary to distinguish in detail the special cases to which one or the other Rule may be exclusively or pre-eminently applicable.

The only further consideration which we need to present, under this division of the argument, has relation to the vessels which properly come within the jurisdiction of the Tribunal.

What vessels under the jurisdiction of the Tribunal.

Observations on this subject in the Case and Counter Case of the United States have been intended to show that the whole list of vessels, for injuries from whose acts claims are presented to the Tribunal, is included within the jurisdiction conferred in and by the first article of the Treaty. We wish simply to add a reference to a passage in the protocol to the Treaty, of May 4, 1871.

A statement is there made which seems to possess much authority in ascertaining the intent of the Treaty on this point. It is found on page 10 of the Case, and reads as follows:

> At the conference held on the 8th of March, the American Commissioners stated * * that the history of the Alabama and other cruisers, which had been fitted out, or armed, or equipped, or which had received augmentation of force in Great Britain, or her Colonies, and of the operations of those vessels, showed extensive direct losses in the capture and destruction of a large number of vessels, with their cargoes, and in the heavy national expenditures in the pursuit of the cruisers, &c.

It is respectfully submitted that this description of the protocol, beyond all controversy, includes the whole list of vessels as insisted upon in the Case and Counter Case.

XIII.—NATURE AND AMOUNT OF DAMAGES CLAIMED BY THE UNITED STATES.

I.—PREFATORY CONSIDERATIONS.

General conclusions.

1. The Counsel of the United States assume that, in the foregoing observations, and the proofs which they have adduced and expounded, they have established the responsibility of the British Government in the premises.

The legal character of this responsibility is defined by the Treaty of Washington. It is matter of express contract between the two Governments.

The contracting parties, in the first place, agree to certain "Rules," by which the conduct of the British Government in the premises is to be judged. These "Rules" constitute the principles, upon which it is to be conventionally assumed that the British Government acts, as to the questions here at issue. These "Rules" profess to define the general obligations of a neutral Government. They expressly set forth to what such a government is *bound*. They are understood by the tenor of the treaty to define expressly what the British Government was bound, in the occurrences debated, to do or not to do with respect to the United States.

2. The Counsel of the United States have applied these Rules to the acts of commission or omission of the British Government, with conclusion as follows:

(*a*) The British Government did not use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of certain vessels, which it had reasonable grounds to believe were intended to cruise or carry on war against the United States.

(*b*) The British Government did not use like diligence to prevent the departure from its jurisdiction of certain vessels to carry on war against the United States, such vessels having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

(*c*) The British Government did permit or suffer the belligerent Rebels of the United States to make use of the ports or waters of Great Bitain as the base of military operations against the United States, or for the purpose of renewal or augmentation of military supplies or arms, or the recruitment of men for naval warfare.

(*d*) The British Government did not use due diligence in its own ports and waters, and as to all persons within its jurisdiction, to prevent any violation of the stipulated rules, (Article VI.)

(*e*) Finally, the British Government has failed to fulfill certain duties, recognized by the principles of international law, not inconsistent with the foregoing "Rules."

Great Britain responsible for the acts of the cruisers.

3. We think we have shown that the British Government is responsible under these Rules for all, or at any rate for certain, of the cruisers in question. If the Arbitrators come to the same conclusion, then they are to award a sum in gross for the claims referred to them, to be paid by Great Britain to the United States; or, after deciding the failure of the British Government to fulfill its duties as aforesaid, they may remit the question of amount to asses-

sors to determine what claims are valid, and what amount shall be paid on account of the liability arising from such failure, as to each vessel, according to the extent of such liability, as decided by the arbitrators, (Article X.)

Thus it appears that the Treaty provides, by various forms of expression, that the liability of Great Britain to pay follows on the conviction of Great Britain of failure to perform her duty in the premises, in conformity with the law of nations and the contract "Rules."

4. What is the measure of this liability? Such is the question which remains to be discussed.

Measure of liability considered.

The Counsel of the United States respond to this question in general terms as follows:

The acts of commission or omission charged to the British Government in the premises constituted due cause of war; in abstaining from war, and consenting to substitute indemnity by arbitration for the wrongs suffered by the United States at the hands of Great Britain, the United States are entitled to redress in damages, general and particular, national and individual, co-extensive with the cause of war, that is to say, sufficient to constitute real indemnification for all the injuries suffered by the United States.

The Tribunal, in order to give such *complete* indemnity to the United States, would have to take up and consider each one of the heads of claim set forth in the American Case.

Claims of losses set forth in the American Case.

These are:

(*a*) The claims for private losses growing out of the destruction of vessels and their cargoes by the insurgent cruisers.

(*b*) The national expenditures in pursuit of those cruisers.

(*c*) The loss in the transfer of the American commercial marine to the British flag.

(*d*) The enhanced payments of insurance by private persons.

(*e*) The prolongation of the war, and the addition of a large sum to the cost of the war, and of the suppression of the Rebellion.

5. All these claims are, as we conceive, clearly comprehended in the positive terms of the Treaty.

These claims all comprehended in the terms of the Treaty.

Whether any of such claims, or any part of them, are so remote in their nature in relation to the acts of the Confederate cruisers as to demand rejection by application of the rule of ordinary law, "*Causa proxima, non remota spectatur*," is a juridical question to be argued as such before the tribunal on the facts, not a question of the tenor of the Treaty.

6. All the claims enumerated are of losses "growing out of the acts" of the Confederate cruisers; all of them are the actual consequences of those acts; whether to be allowed as *proximate* consequences, or to be disallowed as *remote* consequences, it is for the Tribunal to decide.

Such comprehensiveness of the Treaty is, in the opinion of the Counsel of the United States, the apparent meaning of the Treaty; it is the only grammatical meaning, it is the logical meaning, it is the true meaning of the Treaty.

The Treaty, in words of unmistakable universality, submits to the Tribunal all *differences, all claims, all questions* growing out of the acts of the cruisers under consideration.

The language is unequivocal. There is no exception of any particular class or speciality of "difference," "of claim," of question, "growing out of the acts of such cruisers." Not a word is said of direct claims, or of indirect claims. If any such exception were contemplated or intended by either party, he abstained from inserting it, or any hint of it, in the Treaty itself.

II.—QUESTION OF JURISDICTION.

The Agent of the British Government, by a letter communicated to the Arbitrators on the 15th of April, informed them that a misunderstanding had arisen between the two Governments as to "the nature and extent of the claims referred to the Tribunal;" and the Agent of the United States in reply reserved to his Government the right to vindicate the disputed jurisdiction of the Tribunal before the Arbitrators. This we shall now proceed to do.

Great Britain contends that the claims styled "indirect" are not within the scope of the Arbitration.

1. The British Government contends that certain so-called "indirect claims" are not included in the Arbitration. We contend that the Treaty itself contains no sentence, expression, or word, to justify this assumption. On that point we appeal to the text, inspection of which is decisive and conclusive of the question.

The term "indirect" not found in the Treaty.

2. The British Government in effect seems to admit that the text of the Treaty is all-comprehensive in description of the nature of the claims, as claims growing out of the acts of certain vessels, and leaving no subject of inquiry, save in the descriptive words "generically known as Alabama claims," that is, by reference to the principal vessel of the class.

But this expression, "generically known as Alabama claims," does not involve any question of "direct" or "indirect." No such distinction is implied in the words themselves, or in the context.

Rejoinder of the United States to the British assumption.

3. Accordingly, the British Government insists, not so much on the language of the Treaty, as what they *intended* when they assented to it.

To this assumption it is obvious to reply, first, that no such intention is expressed in the Treaty; that such intention was not the understanding of the United States; that if Great Britain had any such intention she should have insisted on its insertion in the Treaty; that as both parties used the same language, there could be no room for misapprehension in this respect; that the intention of parties to a contract is recorded in the contract; and that if, by reason of equivocal language, any doubt arises, it is not for either of the parties to assume to decide the question, but it is a question for the decision of the Tribunal.

The Counsel of the United States are, however, prepared to show that Great Britain had ample notice of the extent of the submission as it was understood by the United States; that is to say, the claims of the United States, in the whole extent of the American Case, were again and again presented to the consideration of the British Government, both before and during the negotiation of the Treaty, as appears by the documents annexed to the Case. This we shall presently proceed to show.

"Indirect," as used in this controversy, is equivalent to "national."

4. Before doing this, we call more particular attention to the equivocal nature of the expression "indirect damages" or "direct damages," as employed by the British Government.

To what injuries or losses do these words refer? Remote consequential injuries or losses? By no means; but chiefly to the immediate *national* injuries suffered by the United States.

The discussions on the part of the British Government are founded upon the assumption that the injuries which one nation does to another as a nation are indirect injuries. We think that such injuries are, on the contrary, emphatically direct in their very nature.

5. To the specification of such claims, when they come to be considered in detail, objection may be made, that such or such particular loss is re-

mote and not proximate; but that is a question which arises in the consideration of the facts. It in no respect affects the generality or comprehensiveness of the expression "all claims growing out" of certain acts.

6. In order to demonstrate that the British Government ought not to have been ignorant of the precise claims now objected to, under whatever name the subject of negotiation, we now proceed to cite the documentary proofs.

(*a*) The Joint High Commissioners, in their negotiations which preceded the Treaty of Washington, made use of the terms "indirect losses" and "direct losses," and these terms were subsequently transferred from the protocols of the conferences of the negotiations to the American Case.

The word "indirect" used in the negotiation which resulted in the treaty.

(*b*) In the public discussions which have since arisen, the terms have apparently been received in a different sense from that in which they were employed by the negotiators, and accepted by the two Governments.

Used in the same sense in this discussion.

It has been assumed by many persons, who were but partially acquainted with the history of the negotiations, that the United States are contending before this Tribunal to be indemnified for several independent series of injuries; whereas they do, in fact, ask reparation but for one series of injuries, namely, those which they, as a Nation, either directly or through their citizens, and the persons enjoying the protection of their flag, have suffered, by reason of the acts committed by the several vessels referred to in their case, which are generically known as the Alabama claims. When the Treaty was signed, both parties evidently contemplated a discussion before the Arbitrators of all the damages which could be shown or contended to have resulted from the injuries for which the United States were seeking reparation.

(*c*) In order to bring any claim for indemnity within the jurisdiction of the Tribunal, the United States understand that it is necessary for them to establish: 1st, that is a claim; 2d, that at the date of the correspondence between Sir Edward Thornton and Mr. Fish, which led to the Treaty, it was generically known as an Alabama claim; and, 3d, that it grows out of the act of some one of the vessels referred to in their Case. They also understand that the Tribunal of Arbitration has full jurisdiction over all claims of the United States which can be shown to possess these three attributes.

What claims are within the jurisdiction of the Tribunal.

A review of the history of the negotiations between the two Governments prior to the correspondence between Sir Edward Thornton and Mr. Fish, will show the Tribunal what was intended by these words, "*generically known as the Alabama claims*," used on each side in that correspondence.

Resume of negotiations respecting Alabama claims.

(*d*) The correspondence between the two Governments was opened by Mr. Adams on the 20th of November, 1862, (less than four months after the escape of the Alabama,) in a note to Earl Russell, written under instructions from the Government of the United States. In this note Mr. Adams submitted evidence of the acts of the Alabama, and stated: "I have the honor to inform your Lordship of the directions which I have received from my Government to solicit redress for the national and private injuries thus sustained."[1]

Mr. Adams, November, 1862, asks "redress for private and national injuries."

Thus the Government of the United States in the outset notified Her Majesty's Government that it would expect indemnification from Great Britain for both the national and the individual losses, and Lord Russell met this notice on the 19th of December, 1862,

Liability denied by Great Britain.

[1] American Appendix, vol. iii, pp. 72, 73.

by a denial of any liability for any injuries growing out of the acts of the Alabama.[1]

United States refuse to relinquish their claims.

When this decision was communicated to the Government of the United States, Mr. Seward informed Mr. Adams that that Government did "not think itself bound in justice to relinquish its claims for redress for the injuries which have resulted from the fitting out and dispatch of the Alabama in a British port." This statement could have referred only to the claims for national and for individual redress which had been thus preferred and refused.

Many claims lodged during the war, but discussion deferred.

As new losses from time to time were suffered by individuals during the war, they were brought to the notice of Her Majesty's Government, and were lodged with the national and individual claims already preferred; but argumentative discussion on the issues involved was by common consent deferred.[2]

In the course of these incidents, Mr. Adams had an interview with Earl Russell, (described in a letter from Lord Russell to Lord Lyons, dated March 27, 1863,) in which, referring to the well-known and permitted conspiracy organized in Great Britain to carry on war against the United States through a naval marine created in British waters, and to the means ostentatiously taken to raise money in London for that purpose, he said, that there was "a manifest conspiracy in this country [Great Britain] to produce a state of exasperation in America, and thus bring on a war with Great Britain, *with a view to aid the Confederate cause.*" And on the 23d of October in the same year, (1863,) Mr. Adams proposed to Earl Russell for the settlement of these claims "some fair and conventional form of arbitrament or reference."[3]

Reasons for calling all the claims "Alabama claims."

It does not appear that during the war the exact phrase "Alabama claims," was used in the correspondence between the two Governments. But it does appear that, in the note in which the claims of the United States for the injuries growing out of the acts of the Alabama itself were first preferred, the United States presented the claims of their citizens for the losses in the destruction of the Ocmulgee, and some other vessels, by the Alabama, and also their own claim for *national injuries* caused by the acts of the same vessel; and that liability for all such injuries being denied by Great Britain, and re-asserted by the United States, the discussion was reserved for a more convenient time by common consent.

When, as already stated, new injuries were received from the acts of other vessels, as well as from acts of the Alabama, claims therefor were added to the list to be all taken up together when the time should arrive. The fact that the first claim preferred grew out of the acts of the Alabama explains how it was that all the claims growing out of the acts of all the vessels came to be "generically known as the Alabama claims."

In April, 1865, United States renew discussion.

On the 7th of April, 1865, the war being virtually over, Mr. Adams renewed the discussion. He transmitted to Earl Russell an official report showing the number and tonnage of American vessels transferred to the British flag during the war. He said, "The United States commerce is rapidly vanishing from the face of the ocean, and that of Great Britain is multiplying in nearly the same ratio." "This process is going on by reason of the action of British subjects in co-operation with emissaries of the insurgents, who have

[1] American Appendix, vol. iii, p. 83.
[2] Mr. Adams to Earl Russell, Am. App., vol. ii, p. 641.
[3] Am. App., vol. ii, p. 182.

supplied from the ports of Her Majesty's Kingdom all the materials, such as vessels, armament, supplies, and men, indispensable to the effective prosecution of this result on the ocean." He asserted that "Great Britain, as a national Power, was fast acquiring the entire maritime commerce of the United States by reason of the acts of a portion of Her Majesty's subjects, engaged in carrying on war against them on the ocean during a time of peace between the two countries;" and he stated that he was "under the painful necessity of announcing that *his Government cannot avoid entailing upon the Government of Great Britain the responsibility for this damage.*" [1]

Responsibility of Great Britain re-asserted.

Lord Russell evidently regarded this as an unequivocal statement of a determination to hold Great Britain responsible for at least a portion of the national injuries growing out of the acts of the cruisers. He said, in reply, "I can never admit that the duties of Great Britain toward the United States are to be measured by the losses which the trade and commerce of the United States have sustained." [2]

Denial of liability

Mr. Adams, in his reply on the 20th of May, repeated the demand. He referred to the destruction of individual vessels and cargoes, and said that, "in addition to this *direct* injury, the action of these British built, manned, and armed vessels has had the *indirect* effect of driving from the sea a large portion of the commercial marine of the United States, and to a corresponding extent enlarging that of Great Britain." He declared that "the very fact of the admitted rise in the rate of insurance on American ships only brings us once more back to look at the original cause of the trouble;" and he again said, that "*the injuries thus received are of so grave a nature as in reason and justice to constitute a valid claim for reparation and indemnification.*" [3]

May, 1865, the United States classify claims as "direct" and "indirect," and demand reparation for all.

It will be observed that the attention of Her Majesty's Government is thus called in terms to a distinction, which has since become the subject of some controversy, between what were styled "direct" and what were styled "indirect" injuries, and that it was made clear beyond a question that the United States intended to claim remuneration for all.

Lord Russel so understood it, and said in reply:

> It seems to Her Majesty's Government that, if the liability of neutral nations were stretched thus far, this pretention, new to the law of nations, would be most burdensome, and indeed most dangerous. A maritime Nation, whose people occupy themselves in constructing ships and cannon and arms, might be made responsible for the whole damages of a war in which that Nation had taken no part.[4]

Great Britain denies liability for indirect and refuses arbitration for direct claims.

Referring to the offer of arbitration, made on the 26th day of October, 1863, Lord Russell, in the same note, said:

> Her Majesty's Government must decline either to make reparation and compensation for the captures made by the Alabama, or to refer the question to any foreign State.[5]

(*c*) This terminated the first stage of the negotiations between the two Governments. They commenced with the demand on the part of the United States for remuneration for national and for individual losses growing out of the acts of the Alabama, and a denial of the liability on the other side. This was followed up by similar demands for injuries growing out of the acts of other vessels, and by a proposal to submit the claims to arbitration.

The negotiations were closed by the repudiation of any possible lia-

[1] Am. App., vol. i, p. 290; vol. iii, p. 522.
[2] Ibid., vol. i, p. 526.
[3] Am. App., vol. iii, p. 553.
[4] Ibid., p. 361.
[5] Ibid., p. 562.

bility of Great Britain for *national* injuries, as being a doctrine "most dangerous" to neutrals, and by the refusal to arbitrate the question of the captures of vessels and cargoes of individuals made by the Alabama.

Lord Russell the author of the term "Alabama claims."

It will be observed that Lord Russell here uses the word "Alabama" in a generic sense. The note of Mr. Adams to which he was replying complained of "the burning and destroying on the ocean a large number of merchant-vessels and a very large amount of property belonging to the people of the United States by a number of British vessels."[1] The Parliamentary paper from which this extract is cited is styled "Correspondence respecting the Shenandoah." Mr. Adams's note refers to the acts of the Shenandoah, the Florida,[2] and the Alabama.[3] Lord Russell's note also refers to the Oreto[4] and the Shenandoah.[5] It is evident therefore that when he denies liability and refuses the arbitration as to the acts of the Alabama, he uses the word "Alabama" in a generic sense.

The conclusion is irresistible either that the Alabama then stood as the generic representative of all the vessels, or, on the other hand, that Lord Russell first endowed the word Alabama with a generic sense.

(*d*) The evidence before the Tribunal does not show the use of the exact expression "Alabama claims" before October 4, 1866.

This term well known in October, 1866.

It then appeared in a leader in the London Times, in the course of which, after referring to the "so-called Alabama claims," it is said: "The loss occasioned by American commerce in consequence may be *damnum sine injuriâ*, and therefore no ground of a legal action, and yet it may be a wise act of courtesy to waive the benefit of this plea." It follows from this, that at that early day the phrase "Alabama claims" had become so well known as to be styled "so-called."

Lord Russell proposes to let by-gones be by-gones.

Great Britain having thus possessed herself of a large part of the American commercial marine, through the acts of the cruisers dispatched from her ports to carry on war against the United States, and having refused not only to make indemnity therefor, but also to submit the question of her liability to arbitration, Lord Russell next proposed, with what makes approach at least to audacity, "the appointment of a commission to which shall be referred all claims arising during the late civil war, which the two Powers shall agree to refer," excluding of course the Alabama claims; in other words, that the extravagant claims of British subjects upon the United States should be recognized, while the grave injuries to the United States and their citizens should be ignored. Great Britain also proposed to guard against a possible retransfer of the commercial marine to the United States under the same circumstances, when England should be a belligerent and the United States should be neutral, by letting "by-gones be by-gones," "forgetting the past," and, "as each had become aware of defects that existed in international law," "attempting the improvements in that code which had been proved to be necessary."[6]

Mr. Seward in reply said:

United States decline to waive any of their claims.

There is not one member of this Government, and, so far as I know, not one citizen of the United States, who expects that this country will waive, in any case, the demands that we have heretofore made upon the British Government for redress of wrongs committed in violation of international law. I think that the country would be equally unanimous in declining every form of negotiation that should have in view merely prospective regulations of national intercourse, so long as the justice of our existing claims for indemnity is denied by Her

[1] Brit. App., vol. iv, paper v, p. 10.
[2] Ibid., p. 11.
[3] Ibid., p. 12.
[4] Ibid., p. 22.
[5] Ibid., p. 3.
[6] Lord Clarendon to Sir F. Bruce, Brit. App., vol. iv, paper 5, p. 164.

Majesty's Government, and these claims are refused to be made the subject of friendly but impartial examination."[1]

(*e*) In the summer of 1866 a change of Ministry took place in England, and Lord Stanley became Secretary of State for Foreign Affairs in the place of Lord Clarendon. He took an early opportunity to give an intimation in the House of Commons that should the rejected claims be revived, the new Cabinet was not prepared to say what answer might be given them; in other words, that, should an opportunity be offered, Lord Russell's refusal might possibly be reconsidered. The Stanley-Johnson convention.

Mr. Seward met these overtures by instructing Mr. Adams, on the 27th of August, 1866, "to call Lord Stanley's attention, in a respectful but earnest manner," to "a summary of claims of citizens of the United States, for damages which were suffered by them during the period of the civil war," and to say that the Government of the United States, "*while it thus insists upon these particular claims*, is neither desirous nor willing to assume an attitude unkind and unconciliatory toward Great Britain." He also said that he thought that Her Majesty's Government could not reasonably object to acknowledge the claims.[2]

Lord Stanley met this overture by a communication to Sir Frederick Bruce, in which he denied the liability of Great Britain, and assented to a reference, "provided that a fitting Arbitrator can be found, and that an agreement can be come to as to the points to which the arbitration shall apply.[3]

A long negotiation ensued. In the course of it Mr. Seward wrote to Mr. Adams thus, on the 22d of May, 1867:

As the case now stands, the injuries by which the United States are aggrieved are not chiefly the actual losses sustained in the several depredations, but the first unfriendly or wrongful proceeding of which they are but the consequences.

(*f*) These negotiations were conducted in London, partly by Lord Stanley and partly by Lord Clarendon, on the British side, and partly by Mr. Adams and partly by Mr. Reverdy Johnson, on the American side. In Washington Mr. Seward remained the Secretary of State. Great Britain was there represented, first by Sir Frederick Bruce, and afterward by Sir Edward Thornton.

(*g*) As the first result of these negotiations, a convention known as the Stanley-Johnson convention was signed at London on the 10th of November, 1868. It proved to be unacceptable to the Government of the United States. Negotiations were at once resumed, and resulted on the 14th of January, 1869, in the Treaty known as the Johnson-Clarendon convention. The Johnson-Clarendon convention.

(*h*) This latter convention provided for the organization of a mixed commission with jurisdiction over "all claims on the part of citizens of the United States upon the Government of Her Britannic Majesty, including the so-called Alabama claims, and all claims on the part of subjects of Her Britannic Majesty upon the Government of the United States which may have been presented to either Government for its interposition with the other since the 26th July, 1853, and which yet remain unsettled."[4]

Lord Granville subsequently said, in the House of Lords, of these two conventions, "the former convention provided (Article IV) that the Commissioners shall have the power to adjudicate upon the class of claims referred to in the official correspondence between the two Governments as the Alabama Lord Granville thinks it admits unlimited argument as to the extent of Alabama claims.

[1] Mr. Seward to Mr. Adams, Feb. 14, 1866, vol. iii, Am. App., p. 628. [3] Ibid., p. 652.
[2] Am. App., vol. iii, pp. 632–636. [4] Am. App. vol. iii, pp. 752, 753.

claims. The latter (Article I) provided that all claims on the part of subjects of Her Britannic Majesty upon the Government of the United States, and all claims on the part of the citizens of the United States upon the Government of Her Britannic Majesty, including the so-called Alabama claims, shall be referred to commissioners, &c. Both conventions purposely avoided defining what constituted the Alabama claims, and admitted almost unlimited argument as to what the Alabama claims were. Both conventions were also open to the objection (at that time unavoidable) that there was no check on the award of the final Arbitrator, who might have given damages to any amount."[1]

It is clear, therefore, that up to the conclusion of the Johnson-Clarendon treaty in January, 1869, there was no doubt in England that the term "Alabama claims" was understood as including the claims for the national injuries.

The convention not acceptable to the United States.

(*i*) It was supposed in America that it was not stated in sufficiently unequivocal terms in the Johnson-Clarendon Treaty that the national claims should be considered by the Arbitrators; and there were many signs that the Treaty, in consequence of that belief, would not receive the assent of the Senate. Mr. Reverdy Johnson, hearing of this, wrote an elaborate defense of himself, which has been seized upon by Her Majesty's Government as proof that the United States had at no time claimed to receive indemnity for the national injuries which they have suffered. But the foregoing *résumé* of correspondence between the two Governments shows that, if Mr. Johnson made such a statement, he did it under a misapprehension.

Mr. Johnson informs Lord Clarendon that the United States have claims of their own on Great Britain

The error was never communicated to Her Majesty's Government. On the contrary, only a few days later he wrote to Lord Clarendon in exactly the opposite sense. He said, referring to a claims convention between the two Governments in 1853, "At that time neither Government, as such, made a demand upon the other; but that, as my proposition assumes, is not the case now. The Government of the United States believes that it has in its own right a claim upon the Government of Great Britain."[2]

(*j*) Her Majesty's Government also received the same intelligence about that time from other sources.

Its Minister at Washington, on the 2d of February, 1869, communicated to it the action of the Senate Committee on Foreign Relations. "Mr. Sumner," he said, "brought forward the above-mentioned convention, and after making a short comment upon its contents, and stating that it covered none of the principles for which the United States had always contended, recommended that the committee should advise the Senate to refuse their sanction to its ratification. Mr. Sumner was authorized to report in that sense to the Senate."[3] On the 19th of April Mr. Thornton also advised Lord Clarendon of the rejection of the Treaty. "Your Lordship perceives," he said, "that the sum of Mr. Sumner's assertion is that England * * * is responsible for the property destroyed by the Alabama and other Confederate cruisers, and even for the remote damage to American shipping interests, including the increase in the rate of insurance; that the Confederates were so much assisted by being able to get arms and ammunition from England, and so much encouraged by the Queen's Proclamation, that the war lasted much longer than it would otherwise have done, and that we ought therefore to pay imaginary additional expenses imposed upon the United States by the prolongation of the war."[4]

Sir Edward Thornton advises Lord Clarendon that the convention is rejected because it is thought that it does not include the indirect claims.

[1] Hansard, *ubi supra*.
[2] Am. App., vol. iii, p. 780.
[3] Ibid., p. 772.
[4] Ibid., p. 784.

(*k*.) This may be called the end of the second stage of the history of the negotiations. It commenced with an intimation from Great Britain that a proposal from the United States would be listened to. In its progress negotiations were opened, which ended in a convention providing for the submission of claims of citizens of the United States against Great Britain, including the Alabama claims. This convention, in the opinion of Lord Granville, admitted unlimited argument as to what the Alabama claims were. The Treaty was rejected by the Senate of the United States, because, although it made provision for the part of the Alabama claims which consisted of claims for individual losses, the provision for the more extensive national losses was not satisfactory to the Senate. It is clear that, by this time, if not before, the phrase "Alabama claims" was understood on both sides as representing all the claims against Great Britain, "growing out of" its conduct toward the United States during the insurrection. A portion of these claims had been, throughout the discussions by Mr. Seward and Mr. Adams, grounded on the unnecessary Proclamation recognizing the insurgents as belligerents. The remainder rested on the acts of the cruisers. All were alike known as Alabama claims.

At this stage of the history, General Grant became President.

On the 15th of May following Mr. Fish instructed Mr. Motley to say to Lord Clarendon that the United States in rejecting the Treaty "abandoned neither *its own claims* nor those *of its citizens*."[1] Again, on the 25th of the following September, Mr. Motley was instructed by Mr. Fish in a dispatch, of which a copy was to be given to Lord Clarendon, to say that the President concurred with the Senate in disapproving the convention which had been rejected; that "he thought the provisions of that convention were inadequate to provide reparation for the United States, in the manner and to the degree to which he considered the United States were entitled to redress;" but that "he was not prepared to pronounce on the question of the indemnities which he thought due to individual citizens of the United States * * * nor of the reparation which he thought due by the British Government for the larger account of the vast *national* injuries it had inflicted on the United States."[2]

Mr. Motley informs Lord Clarendon that the United States do not abandon the national claims.

And that the Johnson-Clarendon convention did not afford sufficient redress for the national injuries.

In an elaborate paper styled "Observations" upon Mr. Fish's dispatch to Mr. Motley, of the 25th of September, 1869, which was appended to Lord Clarendon's dispatches of November 6, 1869, to Sir Edward Thornton, the subject of the national, now called indirect, claims was fully considered in a way which must satisfy the Arbitrators that the British Government understood the nature, character, and extent of those claims. It is difficult when reading these observations, and the dispatch which called them out, to understand how Lord Granville could commit himself to the statement, in one of his recent dispatches, that "*There was not a word in any letter preceding the Treaty to suggest any indirect or constructive claims; and the only intimation the British Government had had was from the speech of Mr. Sumner.*"[3]

The indirect claims as considered by Lord Clarendon.

It seems to us that these incidents are decisive of the whole controversy.

(*l*) In the following December the President thus alluded to the subject in his annual message to Congress:

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[1] Am. App., vol. vi, p. 1.
[2] Ibid., p. 13.
[3] Appendix to British Case, vol. iv, No. 1, p. 19.

President's message to Congress, December, 1869.

The provisions [of the Treaty] were wholly inadequate for the settlement of the grave wrongs that have been sustained by this Government as well as by its citizens. The injuries resulting to the United States by reason of the course adopted by Great Britain during our late civil war; in the increased rates of insurance, in the diminution of exports and imports, and other obstructions to domestic industry and production; in its effects upon the foreign commerce of the country; in the decrease of the transfer to Great Britain of our commercial marine; in the prolongation of the war; and the increased cost (both in treasure and lives) of its suppression: could not be adjusted and satisfied as ordinary commercial claims which continually arise between commercial nations. And yet the convention treated them simply as such ordinary claims, from which they differ more widely in the gravity of their character than in the magnitude of their amount, great as is that difference.

Same in 1870

And still again, in his annual message to Congress in December, 1870, the President referred to the subject with similar precision and particularity of statement, as cited in a previous part of the present Argument.[1]

In January, 1871, the words Alabama claims were understood to include all claims of the United States against Great Britain, both national and individual.

It cannot, therefore, be doubted that, in the beginning of the year 1871, it was well understood by both Governments that the United States maintained that Her Majesty's Government ought, under the laws of nations, to make good to them the losses which they had suffered by reason of the acts of all the cruisers, typically represented by the Alabama—whether those losses were caused by the destruction of vessels and their cargoes; by the prolongation of the war; by the transfer of the commerce of the United States to the British flag; by the increased rates of insurance during the war; by the expense of the pursuit of the cruisers; or by any other of the causes enumerated in the President's message to Congress in 1869. Nor can it be doubted that they intended to reserve the right to maintain the justice of all these claims when opportunity should offer, nor that they regarded all these several classes of losses as embraced within the terms of the general generic phrase "Alabama claims." It is also equally clear that the claims for compensation founded upon the Queen's Proclamation were abandoned by President Grant.

Negotiations opened at Washington.

(*m*) At that time, the condition of Europe induced Her Majesty's Ministers to consider the condition of the foreign relations of the Empire. They found that their relations with the United States were not such as they would desire to have them; and they induced a gentleman, who enjoyed the confidence of both Cabinets, to visit Washington for the purpose, in a confidential inquiry, of determining whether those relations could be improved.[2]

Reasons which induced those negotiations.

(*n*) It was not the first time that Great Britain had had cause solicitously to ask herself whether she might not have need of the good will of the United States.

At the opening of the war between France and Great Britain on the one hand, and Russia on the other, the Emperor Napoleon found himself greatly embarrassed by England's traditional attitude of exigency toward neutrals, so contrary to the traditional policy of France. The Foreign Minister, M. Drouyn de Lhuys, labored in correspondence with the British Government to induce the latter to relinquish her own policy and accept that of France. To effect this object, the great lever employed by M. Drouyn de Lhuys was the apprehension entertained in Great Britain of the possible attitude of the United States. He explains the matter as follows:

Ce qui touchait particulièrement le gouvernement anglais, c'était la crainte de voir l'Amérique incliner contre nous et prêter à nos ennemis le concours de ses hardis vo-

[1] *Ante*, p. 18. [2] Statement by Lord Granville, Hansard, vol. ccvi, p. 1842.

lontaires. La population maritime des États-Unis, leur marine entreprenante, pouvaient fournir à la Russie les éléments d'une flotte de corsaires, qui, attachés à son service par des lettres de marque, et couvrant les mers comme d'un réseau, harcèleraient et poursuivraient notre commerce jusque dans les parages les plus reculés. Pour prévenir ce danger, le cabinet de Londres tenait beaucoup à se concilier les bonnes dispositions du gouvernement fédéral. Il avait conçu l'idée de lui proposer, en même temps qu'au gouvernement français et à tous les états maritimes, la conclusion d'un arrangement, ayant pour but la suppression de la course et permettant de traiter comme pirate quiconque, en temps de guerre, serait trouvé muni de lettres de marque. Ce projet, qui fut abandonné dans la suite, témoigne de l'inquiétude éprouvée par les Anglais.[1]

How M. Drouyn de Lhuys worked on this state of mind of the British Government appears by the following extract from a dispatch from him to the French Minister at London, M. Walewski:

Les États-Unis enfin sont prêts, je ne saurais en douter, à revendiquer le rôle que nous déclinerions et à se faire les protecteurs des neutres, qui eux-mêmes recherchent leur appui. Le cabinet de Washington nous propose en ce moment de signer un traité d'amitié, de navigation et de commerce, où il a inséré une série d'articles destinés à affirmer avec une autorité nouvelle les principes qu'il a toujours soutenus et qui ne diffèrent pas des nôtres. Le principal secrétaire d'état de sa Majesté britannique comprendra que nous n'aurions aucun moyen de ne pas répondre favorablement à l'ouverture qui nous est faite, si la France et l'Angleterre, bien que se trouvant engagées dans une même entreprise, affichaient publiquement des doctrines opposées. Que les deux gouvernements, au contraire, s'entendent sur les termes d'une déclaration commune, et nous pouvons alors ajourner l'examen des propositions des États-Unis. Il me paraît difficile que ces considérations ne frappent pas l'esprit de Lord Clarendon.[2]

These and like representations on the part of M. Drouyn de Lhuys, induced Great Britain to come to an arrangement with France.

(*o*) Not insensible to such motives, Lord Granville, pending the late war between France and Germany, dispatched a confidential agent to America to re-open negotiations with the United States.

This gentleman arrived in Washington early in January, 1871, and found the Government of the United States so disposed to meet the advances of Her Majesty's government that, before the end of the month, Sir Edward Thorton was able to propose to Mr. Fish "the appointment of a Joint High Commission" to "treat of and discuss the mode of settling the different questions which have arisen out of the fisheries," &c.[3]

Preliminary proposals and correspondence.

Mr. Fish replied, accepting the proposition upon condition that "the differences which arose during the Rebellion in the United States, and which have existed since then, growing out of the acts committed by the several vessels which have given rise to the claims generically known as the 'Alabama claims,'" should also be "treated of by the proposed Joint High Commission."[4]

The proposed commission to treat of the Alabama claims.

Sir Edward Thornton, on the 1st of February, answered that "it would give Her Majesty's Government great satisfaction if the claims were submitted to the consideration of the same High Commission."[5]

The President of the United States, under the provisions of the Constitution, nominated to the Senate for its approval five commissioners to serve in the Joint High Commission on the part of the United States, and transmitted to the Senate the correspondence between Mr. Fish and Sir Edward Thornton, to explain the proposed duties of the nominees. Upon this explanation the Senate gave its assent to the several appointments; and thereupon the appointees each received a commission authorizing him "to treat and discuss the mode of settlement of the different ques-

United States commissioners appointed and confirmed on the correspondence, and their powers limited by it.

[1] Drouyn de Lhuys, *Les neutres pendant la guerre d'Orient*, p. 14.
[2] Ibid., p. 28.
[3] Brit. App., vol. iv, paper ii, p. 1.
[4] Ibid.
[5] Ibid., p. 3.

tions which shall come before the said Joint High Commission."[1] The British Commissioners received a broader power, which was stated to be conferred upon them "for the purpose of discussing in a friendly spirit" "the various differences which have arisen" between Great Britain and the United States, "and of treating for an agreement as to the mode of their amicable settlement."

Taking these powers and the correspondence between Mr. Fish and Sir Edward Thornton together, it is evident that each Government contemplated that all the differences between the two Governments within the range of the correspondence were to be discussed with a view to reaching a mode of settlement.

Among the Commissioners named on the part of the United States was Mr. Fish, the Secretary of State, one of the parties to the preliminary correspondence which led to the Treaty; and among those on the part of Great Britain was Sir Edward Thornton, the other party to that correspondence.

The Alabama claims.

(*p*) The subject of the Alabama claims was opened at the fourth conference by an elaborate statement from the American commissioners.[2]

The American commissioners state their understanding of the meaning of those words.

They stated that "in consequence of the course and conduct of Great Britain during the Rebellion" the United States had sustained a great wrong, and had also suffered "great losses and injuries upon their material interests." Thus, in the outset, they drew a distinction between certain political differences which had been the subject of some correspondence between the two Governments, and the material losses and injuries which could be estimated and indemnified by pecuniary compensation. They then went on to state their views more in detail as to such losses and injuries.

In order to bring them within the letter of the correspondence, and to define their understanding of the meaning of the language there used by Mr. Fish and by Sir Edward Thornton, they began by tracing these losses and injuries to the Alabama and the other cruisers. They said that "the history of the Alabama and other cruisers which had been fitted out, or armed, or equipped, or which had received augmentation of force in Great Britain, or in her 'colonies,' showed the losses and injuries for which they are claiming indemnification."

They then said that the damage which they had suffered from these injuries was two-fold: 1st. That which had proximately resulted from the acts of the cruisers, "the capture and destruction of a large number of vessels with their cargoes," and "the heavy expenditures in the pursuit of the cruisers;" and 2d, other injuries resulting less directly, though not less certainly—namely, "the transfer of a large part of the American commercial marine to the British flag," "the enhanced payments of insurance," "the prolongation of the war," "and the addition of a large sum to the cost of the war, and the suppression of the rebellion."

Thus Mr. Fish, one of the parties to the preliminary correspondence, and his colleagues, explained to Sir Edward Thornton, the other party to the correspondence, and to his colleagues, that the history of the cruisers showed all these losses and injuries; in other words, that they all grew out of the acts of those cruisers.

The American Commissioners next expressed their conviction that the history of the cruisers showed "that Great Britain, by reason of failure in the proper performance of her duties as a neutral, had become justly liable for the acts of those cruisers and of their tenders."

[1] Brit. App., vol. iv, paper xii, p. 6.

[2] Ibid., p. 8.

They then turned to the consideration of the damage which the United States had suffered from this class of injuries. They stated the amount of the claims for the destruction of private property which had up to that time been presented. They indicated a manner in which the amount of the expenses for the pursuit of the cruisers could be ascertained. They added that they had not yet made an estimate of the other damages less proximately resulting from the injuries complained of, because they "hoped for an amicable settlement." This, however, was not to prejudice them "in the event of no such settlement being made." They thus distinctly declared that these classes of injuries also were capable of being estimated and pecuniarily indemnified; and they reserved the right to claim such indemnity.

They propose a mode of ascertaining the amount of the damages.

They closed their elaborate statement by proposing that the desired amicable settlement should be made within the walls of the room in which the conference was held, by means of an agreement "upon a sum which should be paid by Great Britain to the United States in satisfaction of all the claims and interest thereon."

And that payment thereof should be made.

Such an arrangement, in connection with the other provisions of the Treaty, would indeed have constituted a settlement, and an amicable one. It would have been a settlement, because, being a discharge of the obligation, it would have ended all controversy. It is not an amicable settlement, it is not in any sense a settlement, to engage in a protracted lawsuit, as the two Governments have been constrained to do, in consequence of the British Government refusing to enter into the amicable arrangement proposed by the United States.

This would have been an amicable settlement;

It has been asserted that this proposal was a "waiver" of the claims classed as "indirect." So far from that being the case, the proposal contemplated that the payment of a gross sum was to be made and accepted as a "*satisfaction of* ALL *the claims.*" Such a payment and such an application of the payment are utterly inconsistent with the idea of a waiver of any of the claims.

But no waiver of any class of claims.

The attitude of Mr. Fish on this occasion, and of the other American Commissioners, was in perfect accord with the constant previous attitude of the American Government, as explained by Mr. Seward in his dispatch to Mr. Adams of January 13, 1868.[1]

Lord Stanley seems to have resolved that the so-called Alabama claims shall be treated so exclusively as a pecuniary commercial claim as to insist on altogether excluding the proceedings of Her Majesty's Government in regard to the war from consideration in the Arbitration which he proposed. On the other hand, I have been singularly unfortunate in my correspondence if I have not given it to be clearly understood that a violation of neutrality by the Queen's proclamation, and kindred proceedings of the British government, is regarded as a national wrong and injury to the United States.

The British commissioners without delay declined the American proposal for an amicable settlement.

The proposal declined;

Sir Edward Thornton, the other party to the preliminary correspondence, and his colleagues, listened without objection to Mr. Fish's definition of the sense in which the phrase "Alabama claims" had been used in that correspondence; nor did they at any time take exception to it, or propose to limit it. On the contrary, they expressly declined to reply in detail to the statement of the American Commissioners.

Without exception to the definition of the term "Alabama claims."

[1] Am. App., vol. iii, p. 688.

After rejecting the "amicable settlement," proposed by the American Commissioners, the British Commissioners next suggested the substitution of a litigious "mode of settlement" in its place, viz, a lawsuit or arbitration, wherein all liability to the United States for the injuries complained of should be denied and contested.

A reference proposed by Great Britain.

The American Commissioners regarded this as a very different adjustment from the one which they had proposed. They unwillingly, and under conditions, accepted the British suggestion to refer to Arbitrators the full statement of injuries which they had just made, and which the British Commissioners had received without cavil.

Unwillingly accepted by the United States.

(q) After a discussion of several weeks the Joint High Commissioners agreed upon a Treaty.

The Treaty of Washington.

The preamble of this instrument recites that "the United States of America and Her Britannic Majesty, being desirous to provide for an amicable settlement of all causes of difference between the two countries, have for that purpose appointed their respective plenipotentiaries."

Meaning of "amicable settlement"

This statement is recitative and historical, and must be taken to be strictly true in the sense in which it was written.

It therefore does not lie in the mouth of either party to the Treaty to deny that each Government, in appointing its Commissioners, desired to provide for an amicable settlement of the San Juan water boundary, of the navigation of the Saint Lawrence, of the Canadian fisheries, of the navigation of Lake Michigan, of the use of the navigable rivers in Alaska, and of the claims of British subjects for losses arising out of acts committed against their persons or their properties, as well as of the Alabama claims.

But when it is attempted to confine the words of this preamble to a single one of the subjects grouped in the Treaty, and to transfer the operation of its language from the Governments of whom the affirmations are made to subjects disposed of in the treaty, it is an evident perversion of the purpose which the parties had in view. For the Treaty itself immediately makes it clear that the parties did not understand that the arragement as to the Alabama claims was an "amicable settlement."

It is declared that the agreements in this respect are made in order "*to provide for the speedy settlement of such claims.*" If an "amicable settlement" of these claims had just been made, it is not to be supposed that the parties would enter into a formal agreement for their "speedy settlement" in the future.

The means for reaching this speedy settlement form the subject of the enacting clause of the Treaty. It is there provided "that all the said claims growing out of the acts of the aforesaid vessels, and generically known as the 'Alabama claims,' shall be referred to a Tribunal of Arbitration."

Claims for reference under the Treaty.

This language is nearly identical with the language of the correspondence between Mr. Fish and Sir Edward Thornton; by referring to what has preceded the Arbitrators will see that the change is one of taste, not of sense; of form, not of substance.

The same which were described in preliminary correspondence.

We look in vain in it for a waiver of any of the demands made by Mr. Fish at the fourth conference. If the parties, after such specific notice, had intended to withdraw from the scope of the Arbitration any of those demands, or to provide that any of the injuries

No waiver of indirect claims.

to the United States growing out of the acts of the cruisers were not to be considered by the Arbitrators, the limitation would undoubtedly have found a place in this part of the Treaty. It is clear, therefore, that there was no such purpose.

Having provided a manner for giving the Tribunal jurisdiction over the subject of the reference, the Treaty next defines the extent of that jurisdiction.

The Arbitrators are to determine, 1st, whether the United States have suffered any of the specified injuries, that is, any injuries growing out of the acts committed by the cruisers; 2d, whether Great Britain is liable to indemnify the United States for any of those injuries, and if so, for which ones; and, 3d, it is provided that, in case the Tribunal finds that Great Britain has failed to fulfill any duty or duties as aforesaid, it may, if it thinks proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it; but it is nowhere stated or intimated that in reaching that gross sum any part of the injuries to the United States which may be shown to grow out of the acts of the cruisers are to be or may be disregarded by the Arbitrators. Mr. Montague Bernard in his lecture on the Treaty has fairly admitted this. He says:

Powers of the Tribunal.

Power to assess damages not limited.

> The Treaty of Washington is carefully framed to embrace only specific claims, such as had previously become known to both Governments under the name of the "Alabama claims," for losses and damages caused by the acts of certain vessels, of which the Alabama was the typical instance; further, the losses must be such as can be fairly ascribed to some failure of duty on the part of England in respect of these vessels; and in making an award each vessel is to be taken separately. *But, beyond this, the Treaty does not define, by express words of limitation, the nature of the losses on account of which compensation may be awarded, should the Arbitrators decide that any compensation is due. On this single point a disagreement has arisen between the two Governments.*[1]

Views of Mr. Bernard.

That is true; the Treaty does not contain any express words of limitation. Nor does it contain any words to imply or suggest limitation. On the contrary the words are unequivocally and explicitly general, not to say universal, as comprehending *all* claims of the "specific" class; that is, "Alabama claims." The assumption that there is such limitation is a contradiction of the express language and the plain meaning of the Treaty.

It appears from all this that the Arbitrators received by the Treaty full jurisdiction over all the claims presented and defined by the American Commissioners at the opening of the fourth conference. This conclusion receives a significant support from the twelfth article of the Treaty. That article provides for the creation of another and an independent Tribunal, which is also to have juridical powers for finding injuries and awarding damages. The claims to be submitted to such Tribunal are defined to be "claims on the part of corporations, companies, or private individuals, citizens of the United States, upon the Government of Her Britannic Majesty," and "claims on the part of corporations, companies, or private individuals, subjects of Her Britannic Majesty, upon the Government of the United States." Great care is thus taken to limit the jurisdiction of the tribunal created by Article XII to the consideration of injuries suffered by individuals, companies, or corporations. But the Tribunal of Arbitration at Geneva is invested by the terms of Article I with the jurisdiction over "*all the claims on the part of the United States* growing out of the acts" committed by the cruisers. The limitation to individual claims which is found in the twelfth article, is not found in the first article. On the contrary

Twelfth article of the treaty.

[1] Lecture on the Washington Treaty, May 28th, 1872, London Times, 29th May, 1872.

the language widens out with the evident purpose of enabling the court to become possessed of complete jurisdiction of the case.

(r) Four of the five British Commissioners have made public statements regarding these negotiations. No two of them agree.

Sir Stafford Northcote for instance has said, that "the Commissioners were distinctly responsible for having represented to the Government that they understood a promise to be given that these claims were not to be put forward, and were not to be submitted to Arbitration."[1]

Sir Stafford Northcote.

But Lord Ripon says:

> If Her Majesty's Commissioners had been induced by any such understanding to employ language which in their judgment admitted these claims, they would be liable to just and severe blame.[2]

Lord Ripon.

And yet Mr. Montague Bernard says, as if in apology for the language of the Treaty:

Mr Bernard.

> It is often necessary for the sake of agreement to accept a less finished or even less accurate expression instead of a more finished or more accurate one, and which must be construed liberally and reasonably, according to what appears to be the true intention of the contracting parties.[3]

All reasoning from recollections and understandings ought to disappear in reading the protocol of the second conference of the Joint High Commission, where it is stated that "at the commencement of the conference the United States High Commissioners called attention to the provision in the Constitution of the United States, by which the advice and consent of the Senate is required for the ratification of any Treaty which may be signed under the authority of the President."

Evidence from Protocol II.

It ought not to be credited that Her Majesty's High Commissioners, after such a notice, would have been content to rely upon any promise of the American Commissioners to protect Great Britain against a class of claims which, without such promise, were apparently included in the operative words of the Treaty sent to the Senate for its constitutional action. This conclusion is strengthened by the fact that Lord Ripon, Sir Stafford Northcote, and Mr. Montague Bernard left the United States before the Senate had acted upon the Treaty, and had no opportunity to know what affected the action of that body.

They proceeded to England. Soon after their arrival there the Treaty became the subjectof discussion in each House of Parliament.[4]

Debate in Parliament.

Earl Granville, in the House of Lords, made a speech, in which he used expressions which have since been much commented upon. He said that "the pretensions" advanced by Mr. Fish "en-

Lord Granville.

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[1] London Times May 28, 1872. Sir Stafford Northcote explains his meaning in a note read by Lord Derby in the House of Lords, and printed in the London journals of the 9th of June, 1872:

"It has been supposed, and you seem to have supposed, that I said that an understanding existed between the British and the American negotiators that the claims for indirect losses should not be brought forward, and it has been inferred from this that we, relying upon that understanding, were less careful in framing the Treaty than we should otherwise have been.

"That is incorrect. What I said was that we had represented to our Government that we understood a promise to have been given that no claims for indirect losses should be brought forward. In so saying I referred to the statement voluntarily and formally made by the American Commissioners at the opening of the conference on the 8th March, which I for one understood to amount to an engagement that the claims in question should not be put forward in the event of a Treaty being agreed on."

[2] London Times, June 5, 1872.

[3] London Times, *ut supra*.

[4] House of Lords, Hansard, N. S., vol. 206.

tirely disappear under the limited reference which includes merely complaints arising out of the *escape of the Alabama*." Could anything have been more inaccurate than this brief, even bald, expression? We shall soon notice this speech further. At present it is sufficient to say that Lord Granville himself probably would not now contend that it was in any sense a correct statement of the effect of the operative clause of the first article of the treaty. Lord Cairns immediately challenged it. He said:

I quite concur in the opinion that, under the Arbitration proposed by my noble friend, the late Foreign Secretary, and Lord Clarendon, it was quite possible for the United States to have made extravagant claims. But what is there in the present Treaty to prevent the same thing? I cannot find one single word in these protocols or in these Rules which would prevent such claims being put in and taking their chance, and under the Treaty proposed by my noble friend they could do more. There is this difference in a controversy of this kind between leaving all questions open to an Arbitrator or Arbitrators in whom you have confidence, and in referring these questions to these arbitrators with certain cut and dried propositions unfavorable to your views of the case. Suppose I charge a man with burning my house, and tell him that I hold him answerable for all the damages that ensue; and he said, "You have no power whatever. I happened to be passing at the time, and I saw a great number of men attacking your house and burning it. It was not in my power to prevent them doing it. I am sorry to see what happened, and I will refer the whole question to Arbitration." I should be quite willing to say, I am perfectly prepared to refer the question to Arbitration if there is an article in the agreement providing that any person passing by while other persons were setting fire to my house, and did not stop them, is answerable for all the civil consequences of the house improperly being destroyed. Of course, if a man is so foolish as to consent to such an arrangement, he must not be surprised when he is made responsible for all the damage.

Lord Cairns says the indirect claims included in the treaty

These remarks of Lord Cairns were the only ones made during that debate which can aspire to be regarded as a criticism upon the operative part of the first section of the Treaty. They were full, precise, learned, and not open to doubt. Lord Ripon, who had negotiated the Treaty, was present at that debate. Lord Granville, who had from day to day, through the Atlantic cable, instructed Lord Ripon and his colleagues in the course of the negotiations, was also present. The Duke of Argyll, the Lord Chancellor, and Lord Kimberley, all Cabinet Ministers, were there. Did any or either of them dissent from Lord Cairns's opinions? If they did, the official records of the debates do not show it, although all of them spoke in the debate.

His construction not questioned

So far as the views of Lord Ripon can be gathered from a speech made by him in the same debate, they were in accord with those of the United States. He said:

Lord Ripon's views.

Now, so far from our conduct being a constant course of concession, there were, as my noble friend behind me (Earl Granville) has said, numerous occasions on which it was our duty to say that the proposals made to us were such as it was impossible for us to think of entertaining. Nothing can be more easy than to take the course adopted by my noble friend opposite, (the Earl of Derby,) and to say that all the demands we resisted were so preposterous that it would have been absurd to entertain them, while those upon which concession was made were the only ones really in dispute. My noble friend says that no Arbitrator would have entertained a claim for what the Americans term our premature recognition of belligerent rights and the consequent prolongation of the war. That may be true; but in the convention to which my noble friend appended his name, it would have been open to the Americans to adduce arguments on that point.

Is it not the fair, is it not the only conclusion to be derived from this language, that, while in the Treaty the United States abandoned their "claims for *the premature recognition of belligerent* rights, and the *consequent* prolongation of the war," they adhered to *all* the claims growing out of the acts of the cruisers as they had been defined in the protocol? *Expressio unius, exclusio alterius.*

In the debate in the House of Commons, on the 4th of August, Sir Stafford Northcote spoke. His speech was reported in the Times of the next day. He said, regarding the previous conventions:

Sir Stafford Northcote.

> They [the United States] might have raised questions with regard to what they called England's *premature recognition of belligerency*, and the *consequential* damages arising from the prolongation of the war, and with regard also to other questions which this country could not have admitted. Instead of this being the case, however, the Treaty, as actually concluded, narrowed the questions at issue very closely by confining the reference solely to losses growing out of the acts of particular vessels, *and so shutting out a large class of claims* upon which the Americans had heretofore insisted.

Thus, according to Sir Stafford Northcote, also, the claims abandoned by the United States were those "growing out of" "the premature recognition of belligerency." He evidently did not think that they had abandoned any of their claims "growing out of the acts of the vessels;" otherwise he would have said so. On the contrary, he said that the "large class of claims upon which the Americans had heretofore insisted" were to be "shut out," not because they were expressly excluded by the terms of the Treaty, but because, "by confining the reference solely to losses growing out of the acts of particular vessels," the parties had, in his judgment, made it impossible for the United States to connect the objectionable claims with what the treaty pointed out as the only cause of the injuries which the Arbitrators could regard.

The United States thought that it was possible to make such a connection, and so they stated in their Case. The conflicting revelations of the several Commissioners which have followed, justify Sir Stafford Northcote in his remark, that "in order to maintain a thorough good feeling between the two countries, it was better * * * that the public of England and America should see the result at which the Commissioners had arrived, without going into all the questions raised and discussed in the course of the negotiations."

More than that, they show the wisdom of the decision of Her Majesty's Government, announced by Lord Granville in his speech in the following language:

> At their very first meeting the American and the British Commissioners came to an agreement that they would keep secret their discussions, and that, though accounts of them would be communicated to their respective Governments, yet they were to be considered as confidential, and not to be published. I may add, that I have not the lightest doubt of the wisdom of the course pursued by the British and American Commissioners. They had thirty-seven long sittings; and I will venture to say that if every one of the ten Commissioners—not to mention the two able secretaries—had thought it incumbent upon them to show their patriotism and power of debate for the admiration of the two hemispheres, the thirty-seven sittings would have been multiplied by at least ten times, while the result of their deliberations would have been absolutely *nil*. I think the Commissioners on both sides acted advantageously to their respective Governments. The representations of both displayed great zeal, ability, patience, temper, and an honest desire to come to some compromise, even though the difficulties appeared at first sight to be irreconcilable. The noble earl (Earl Russell) thinks that whenever the Americans proposed anything it was immediately accepted. This, however, was by no means the case. The fact is, that the Americans, in perfect good faith, laid down a great many conditions which the British Commissioners at once declined to accede to, and even refused to refer for consideration to the Government at home. Many other propositions that were made were referred back to Her Majesty's Government, the commissioners thinking it their duty to inform Her Majesty's Government that upon their answer in the affirmative or negative the continuance of the negotiations might depend. In considering several of those questions Her Majesty's Government felt that there would be a great responsibility in breaking off the negotiations, and that in such an event ridicule almost would be brought upon the Commissioners and ourselves. Nevertheless, we at once declined to yield in every case where we deemed it our duty not to yield. With regard, however, to other points, such as those relating to forms of expression, and which did not conflict with the real objects of the Treaty, we willingly either acquiesced in the proposal or else made counter proposals, which were met in the same spirit of fairness by the American Commissioners.

When Lord Cairns heard this statement he said, this is "a Treaty upon which the Government did not merely give a final approval, but for the daily composition of it they were virtually responsible." The Counsel of the United States, therefore, feel themselves justified in assuming that such masters of the English language as Mr. Gladstone, Lord Granville, the Lord Chancellor, the Duke of Argyll, and other members of the British Cabinet, must have been aware of the extent of the operative words of the first article of the Treaty, and must have seen that it contained no waiver of the indirect claims, or limitation of the powers of the arbitrators. They did not object to it, and it must have been because they felt that they had protected Great Britain by the condition which they had imposed upon the United States, obliging them to trace all their complaints of injury to the acts of the cruisers as the originating cause of the damage.

Conclusions.

(*s*) The signature of this Treaty terminated the third stage of the negotiations between the two Governments. It left the Parties solemnly bound to invite other Powers to join them in creating a Tribunal to take jurisdiction of "*all* the said claims growing out of acts committed by the aforesaid vessels, and generically known as the 'Alabama claims.'"

To bring a complaint within that definition, it must be a *claim;* that is, an injury for which the United States demand pecuniary compensation. The evidence is overwhelming that from the commencement they have demanded compensation for their national injuries, as well as for the injuries to their citizens, growing out of the acts of the vessels.

It must also have been generically known as an Alabama claim. The evidence is equally conclusive that the American Commissioners understood that the national and private injuries set forth in the American statement at the fourth conference were so generically known, and that Her Majesty's Commissioners, to say the least, ought to have known it.

The claim must also grow out of the acts of the cruisers. That is a fact which the United States will be held bound to establish in these proceedings to the satisfaction of the Arbitrators.

(*t*) The United States, without suspicion that this palpable sense of the Treaty would be called into question, prepared and presented their Case to the Tribunal in December, on that theory.

The American Case stated the claims in the language of the joint high commissioners.

After stating in that document in detail the principal reasons which induced them to think that Great Britain is justly liable to them for the injuries growing out of the acts of the cruisers, they presented the statement of those injuries in the precise language and form in which their Commissioners had stated them to the British high Commissioners, introducing nothing new, and varying in no respect from what had already been introduced and agreed upon.

They offered evidence which might enable the Arbitrators to determine the amount of the injuries which they had suffered by reason of the loss and capture of the vessels and cargoes belonging to their citizens, or by reason of the increase in the rates of insurance, or by reason of the expense to which they had been put in the pursuit and capture of the vessels.

As to the transfer of their commercial marine to the British flag, they offered no evidence; but they said that they "asked the Tribunal to estimate the amount which ought to be paid to them" for that transfer.

Neither did they offer evidence of the damages to them from the prolongation of the war. They said "it is impossible for the United States to determine; it is, perhaps, impossible for any one to estimate with accuracy the vast injury which these cruisers caused in prolonging the war." They

contented themselves, therefore, with stating reasons why (should the Tribunal hold that Great Britain is liable to make compensation to them for this class of injuries) the month of July, 1863, should be taken to be the time from which the war was prolonged by the acts of the cruisers; and they added that the Tribunal would be thus "able to determine whether Great Britain ought not, in equity, to reimburse to the United States the expenses thereby entailed upon them."

Long delay in objecting to it by Great Britain.

(*u*) Fifty days after Her Majesty's Government was made acquainted with the interpretation of the Treaty set forth in the American Case, it took exception, and averred that it had not expected to find claims preferred against it for increased rates of insurance, for the transfer of the commercial marine, and for the prolongation of the war.

The United States had no intelligence before the 3d of February of this construction of the Treaty by Her Majesty's Government. They think it fair to argue that a long silence on so vital a question as the extent of this submission implies some doubt in the mind of the parties remaining silent as to the justice of their conclusions. In a similar case between private parties, it might well be assumed that so long a delay in communicating the views of a party situated as Her Majesty's Government was, after full knowledge of the views of the other party, would be deemed to be a waiver of the right to object.

Supposed concessions to the United States in the treaty.

(*v*) It has been said that the Treaty of Washington involved several concessions on the part of Great Britain, which were the supposed price paid for the abandonment of the national claims of the United States.

The rules.

1. It has been assumed that the declaration of certain principles to govern the Tribunal was a concession to the United States. But, unfortunately for this theory, it is stated in the British Case that these principles are "in substantial accord with the principles" of the general system of international law; and further, Lord Ripon, the chief of the British High Commissioners, has said that "Great Britain accomplished a signal benefit in binding the American Government by rules" from which "no country on the face of the earth is likely to derive so much benefit as England."

Expression of regret.

2. It is said that the expression of regret for the escape of the cruisers was a concession; but it cannot be supposed that in the friendly expression of regret for the escape of the cruisers Her Majesty's Government *bargained* for the withdrawal of claims which they regarded as dangerous to them.

Fenians.

3. Acquiescence in the refusal to consider the Fenian claims in the Joint High Commission has been put forward as another concession. But the evidence shows that this class of claims was not embraced in the correspondence on which the Joint High Commission was founded, and therefore could not be considered, although in presenting it Her Majesty's Government recognized the propriety of presenting claims for national as distinguished from claims for private injuries.

In fact, Fenian claims for national injuries were presented by the British Commissioners. They are thus defined in the instructions to the British Joint High Commissioners:

> In connection with the claims of British subjects, there is a claim on the part of the dominion of Canada for losses in life and property, and *expenditures* occasioned by the filibustering raids on the Canadian frontier, carried on from the territory of the United States in the years 1868 and 1870.[1]

[1] Brit. App., vol. IV.

The presentation of these claims to the Joint High Commissioners of the United States is recorded in the following words in the protocol:

At the conference on the 4th of March, * * the British Commissioners proposed that the Joint High Commission should consider the claims for injuries which the people of Canada had suffered from what were known as the Fenian raids.

At the conference on the 26th of April, the British Commissioners again brought before the Joint High Commission the claims of the people of Canada for injuries suffered from the Fenian raids. They said they were *instructed to present these claims*, and to state that they were regarded by Her Majesty Government as coming within the class of subjects indicated by Sir Edward Thornton in his letter of January 26th as subjects for the consideration of the Joint High Commission.[1]

The American Commissioners replied that they were instructed to say that the Government of the United States did not regard these claims as coming within the class of subjects indicated in that letter as subjects for the consideration of the Joint High Commission, and that they were without any authority from their Government to consider them. They therefore declined to do so.

At the conference on the 3d May, the British Commissioners stated that they were instructed by their Government to express their regret that the American Commissioners were without authority to deal with the question of the Fenian raids, and they inquired whether that was still the case.

The American Commissioners replied that they could see no reason to vary the reply formerly given to this proposal.

The British High Commissioners said that, under these circumstances, they would not urge further that the settlement of these claims should be included in the present treaty. And that they had the less difficulty in doing this *as a portion of the claims were of a constructive and inferential character.*

No argument, therefore, can be drawn from any supposed concessions by Great Britain, to justify that power in denying the jurisdiction of this Tribunal over the national claims which were presented, and persisted in, by the United States. Nor can it be assumed that Her Majesty's Government objected on principle to a class of claims which, in a parallel case, Commissioners were presenting and urging upon the United States.

(*w*) Whatever doubt, if any, may ever have existed, or have been set up on the part of Great Britain, as to the true tenor of the *written Treaty*, no such doubt can reasonably exist at the present time. Conclusions.

While Mr. Gladstone, in the House of Commons, was asserting in such positive terms that the so-called indirect claims are excluded by the unequivocal and positive language of the Treaty, and denying that the Treaty could possibly receive any other construction, Lord Derby, in the other house, admitted that the Treaty was susceptible of the construction placed upon it by the United States; and in a later debate both Lord Derby and Lord Cairns in unequivocal language supported the same views.

All delusion on that point is now dispelled. No statesman in Great Britain would probably now make the assertion made by Mr. Gladstone, in February, in the House of Commons.

The Treaty speaks for itself. It is universally conceded that its natural construction is that put upon it in the American Case. Discussion of the subject has advanced so far at least towards dispelling misapprehension.

(*x*) Neither the hypothesis of Mr. Bernard, nor that of Sir Stafford Northcote, is produced in the celebrated debate in the House of Lords, which has already been alluded to, and which has been adduced by the

[1] Sir Edward Thornton, in his note of the 25th of January, proposed a settlement of the questions "with reference to the fisheries on the coast of Her Majesty's possessions in North America, and as to any other questions between them which affect the relations of the United States towards those possessions."

British Government as notice to the United States, because of the alleged presence of Mr. Schenck, the American Minister.

In the first place, the expressions of Lord Granville on that occasion did but very obscurely refer to the question of the so-called indirect claims. He said:

Lord Granville's speech.

The noble Earl said that the United States has made no concessions; but in the very beginning of the protocols, Mr. Fish, renewing the proposition he had made before to much larger national claims, said:

"The history of the Alabama and other cruisers which had been fitted out, or armed, or equipped, or which had received augmentation of force in Great Britain or in her colonies, and of the operations of those vessels, showed extensive direct losses in the capture and destruction of a large number of vessels with their cargoes, and in the heavy national expenditures in the pursuit of the cruisers; and indirect injury in the transfer of a large part of the American commercial marine to the British flag, in the enhanced payments of insurance, in the prolongation of the war, and in the addition of a large sum to the cost of the war and the suppression of the Rebellion; and also showed that Great Britain, by reason of failure in the proper observance of her duties as a neutral, had become justly liable for the acts of those cruisers and of their tenders; that the claims for the loss and destruction of private property which had thus far been presented amounted to about $14,000,000 without interest; which amount was liable to be greatly increased by claims which had not been presented." [1]

These were pretensions which might have been carried out under the former Arbitration; but they entirely disappear under the limited reference which includes merely complaints arising out of the escape of the Alabama. [2]

Now there are some things quite remarkable in this part of Lord Granville's speech—the only part which refers to the subject.

In citing the statement made by the American Commissioners, (not Mr. Fish,) which appears in the protocol of May 4, 1871, he stops at the word "presented," noted with a period, as if it were the conclusion of the statement of the American Commissioners; while in the text there is a semicolon after the word "presented;" and the sentence concludes with the following words:

That the cost to which the Government had been put in the pursuit of the cruisers could easily be ascertained by certificates of Government accounting officers; that in the hope of an amicable settlement, no estimate was made of the indirect losses, without prejudice, however, to the right to indemnification on their account in the event of no such settlement being made.

Now the concluding words of the sentence, thus omitted by Lord Granville, contradict the intention which is ascribed to the American Commissioners, and thus annihilate the foundation for the subsequent remarks that these "pretensions entirely disappear under the limited reference which includes mere complaints arising out of the escape of the Alabama."

Lord Granville does not say, with Mr. Bernard, that the supposed limitation of the reference consists of *inaccurate* language, purposely used in the spirit of diplomacy; nor does he say, with Sir Stafford Northcote, that the limitation is to be found in some unrecorded understanding of Commissioners; but he assumes to find the limitation in the express words of the Treaty.

This is done by assuming that the Treaty itself "*includes merely complaints arising out of the escape of the Alabama.*" This assumption is entirely unfounded; for the Treaty submits "all the said claims, growing out of acts committed by the aforesaid vessels, and generically known as the 'Alabama claims;'" which is a very different thing from the recital in Lord Granville's speech.

Indeed, taking that speech as a whole, it is by no means clear that Lord Granville intended to set up any other limitation in the Treaty than such as would exclude claims on account of premature recognition of the

[1] Parl. Paper, No. 3, (1871,) p. 8.

[2] Hansard, vol. ccvi, p. 1851.

belligerence of the Confederates by Great Britian. This hypothesis would explain his reference to claims connected with the cruisers.

We have sufficiently demonstrated, we think, that neither this phrase, nor any other contained in the Treaty, justifies the construction put upon it by Lord Granville.

In comparing what was said in this debate in the House of Lords by Lord Granville and Lord Cairns, with what is said by Sir Stafford Northcote in his speech, and Mr. Bernard, in his lecture, we think we see the explanation of all misconceptions respecting the scope of the treaty prevailing in Great Britain. Explanation of the misunderstanding.

The Johnson-Clarendon Treaty did not exclude from consideration, at least by words of express exclusion, claims of the United States on account of the premature recognition by Great Britain of the insurgents. Undue generality of language was imputed to that Treaty by members of either house of Parliament. When the Treaty of Washington came under discussion in Parliament, Lord Granville said, and said truly, that in this respect the Treaty of Washington had advantages over the Johnson-Clarendon Treaty. The former did not, like the latter, comprehend the belligerency question as a ground of claim. Lord Granville proved this by reference to the protocols and also to the Treaty, which in terms confines the American reclamation to losses growing out of the acts of cruisers of the Confederates designated by the typical name of the Alabama.

Mr. Bernard spoke in the same sense when he said in the remarks already quoted that the claims submitted were *specific*, (which is true,) as they are only the class of claims which grew out of the acts of the cruisers.

When Sir Stafford Northcote speaks of an "understanding" or a "promise" in limitation of the American claims, he confounds the two totally distinct questions of claim on account of the Queen's Proclamation and the national injuries occasioned by it, and the claims on account of the insurgent cruisers and the national injuries occasioned by their acts. It was understood, and it is understood, that the former class of injuries are not comprised in the Treaty, but are in effect excluded by the express language of the Treaty, which confines reclamation to acts of the Confederate cruisers. It was understood, and it is understood, that the claims of the United States under the Treaty are co-extensive with losses growing out of the acts of the Confederate cruisers *without limitation*, because such is the express stipulation of the Treaty. Sir Stafford Northcote's memory is at fault in suggesting that any understanding existed, or that any promise was ever made to prevent the United States from presenting claims for national injuries in this behalf. These, and the claims of private persons, are two classes of claims which had been previously presented by the American Government, and had been insisted on by it, in all the correspondence and acts associated with the Treaty of Washington.

(*y*) We think the Arbitrators must conclude that Her Majesty's Government is in error in assuming that this august Tribunal is excluded from the consideration of any class of claims brought before it by the Case of the United States. The previous negotiations of the parties, the history of the cliams, the explicit declarations of the American negotiators in the conferences of the Joint High Commission, the proceedings in both Houses of Parliament, the long delay of the British government in acting upon the American Case after they knew its contents, the natural and only reasonable construction of the language of the Treaty itself—all strengthen this belief. Resume.

(*z*) When two Nations have agreed by Treaty to submit to arbitration a question of national wrong between them, such agreement takes the place of war. If therefore it could by ingenious reasoning be made to appear (which we deny) that the British construction of this Treaty might possibly be maintained as plausible, yet we conceive that this Tribunal will, in the general interest of peace, feel itself not only authorized, but required, to so construe the Treaty as to take to itself the decision of every question pertinent to the issues, which, left unsettled, could lead to war.

Arbitration takes the place of war.

The Tribunal the judge of its own powers.

(*a a*) Pradier Fodéré, in one of his notes to Vattel, makes the following observations:

Pradier Fodere.

> L' arbitrage, très-usité dans le moyen-âge, été presque entierement négligé dans les temps modernes; les exemples d'arbitrages offerts et acceptés sont devenus de plus en plus rares, par l'experience des inconvenients qui semblent être presque inséperables de ce moyen, ordinairement insuffisant par le défaut d'un pourvoir sanctionateur.
>
> Los que les grandes puissances constituent un tribunal arbitral, ce n'est ordinairement que pour des objets d'intérêt secondaire.[1]

Yet all men are of accord to look to international Arbitration as one of the means of diminishing wars, and much had been expected as an example from the present Arbitration.

The principle of international arbitration is well defined by Calvo, as follows:

> L'arbitrage international dérive de la même cause et repose sur les mêmes principes que l'arbitrage privé en matière civile ou commerciale. Il en diffère en ce que celui-ci est susceptible d'homologation par un tribunal ordinaire, qu'il est absolument obligatoire et que l'exécution en peut être toujours suivie par les voies de droit commun. Entres les états, le principe de souveraineté et d'indépendance réciproque n'admet en cette matière qu'une obligation morale de s'incliner devant les résultats de l'arbitrage sollicité; aussi, avant de recourir à ce mode de solution et pour mieux assurer le but définitif que l'on poursuit, est-il d'usage que les parties en présence signent ce qu'en langage de droit on appelle un *compromis*, c'est-à-dire, une convention spéciale qui précise nettement la question à débattre, expose l'ensemble des points de fait ou de droit qui s'y rattachent, trace les limites du rôle dévolu à l'arbitre et, sauf les cas d'erreur matérielle ou d'injustice flagrante, implique l'engagement de se soumettre de bonne foi à la décision qui pourra intervenir.[2]

Calvo.

Neither party loses anything by such good faith. The nature of the contract of international arbitration affords perfect remedy to either party, in the contingencies in which either is wronged, namely:

> 1°. Si la sentence a été pronoucée sans que les arbitres y aient été suffisamment autorisés, ou lorsqu'elle a statué en dehors ou au-delà des termes du compromis;
>
> 2°. Lorsque ceux qui ont rendu la sentence se trouvaient dans une situation d'incapacité légale ou morale, absolue ou relative, par exemple, s'ils étaient liés par des engagements antérieurs ou avaient dans les conclusions formulées un intérêt direct ignoré des parties qui les avaient choises;
>
> 3°. Lorsque les arbitres ou l'une des parties adverses n'ont pas agi de bonne foi;
>
> 4°. Lorsque l'un ou l'autre de états intéressés dans la question n'a pas été entendu ou mis à même de justifier de ses droits;
>
> 5°. Lorsque la sentence porte sur des questions non pertinentes;
>
> 6°. Lorsque sa teneur est absolument contraire aux règles de la justice et ne peut, dès lors, faire l'objet d'une transaction.[3]

Conspicuous among causes of exception, is the case of "a *sentence* which bears on questions not pertinent." But neither party can anticipate that the arbiters will undertake to decide any question beyond their competency.[4]

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[1] Vattel, Droit des gens, éd. P. Fodéré, tom. ii, chap. xviii, sec. 329, note.

[2] Calvo, Droit international, éd. fr., 1870, tom. i, p. 791.

[3] Calvo, ibid., p. 766. Compare Heffter, Droit international, liv. ii, s. 109; Bluntschli, Code de Droit international, liv. i, s. 667.

[4] Pradier Fodéré, La Question de l'Alabama et le Droit des gens; Pierantoni, Gli arbitrati internazionali e il trattato Washington.

(*b b*) Great Britain entered into an engagement to submit all the points in question to the Tribunal. We only ask the Tribunal to exercise the measure of jurisdiction which has been conferred upon them.

We assume that the Arbitrators have the power in the first instance to judge of their own competency, both in point of the scope of the Treaty and of the possible action of either Government.

The effect of the Treaty is to create a tribunal with complete jurisdiction of the *subject-matter*. It differs from a tribunal established by municipal law in two respects: first, that as Arbiters they do not possess the power of causing the execution of their sentence;[1] and, secondly, that constituting an international tribunal, no such authority exists to enforce their sentence as in the case of arbitration under municipal law.

In fact, the *sanction* of the acts of the Tribunal is the faith of the Treaty.

(*c c*) That the Tribunal possesses power to pass on the question of its competency is a conclusion of general law; otherwise it would be a council of mediation, not a tribunal of arbitration. It is a conclusion also from the tenor of the particular Treaty, which commits to the Tribunal, not only "all differences" and "all claims," but "all questions" submitted by either Government.

This conclusion is in perfect consonance with pure reason. We shall not assume that either Government maintains that, where one of the parties to a contract suggests doubt as to the meaning of some clause, such expression of doubt dissolves the contract. That is contrary to law and to reason. If it were admitted between individuals, no man could ever be compelled to execute a contract. If it were admitted between nations, it would be idle to enter into treaties; for then, if, after treaty concluded, one power regrets its engagement, it needs only to proclaim a difference of intention, and thus to frustrate the rights of the other Power.

(*d d*) Indeed, if we may regard the pertinent explanations of Mr. Bernard, there is general reason for submitting the construction of treaties to the judgment of arbiters, and special reason in regard to the present Treaty. He says of treaties generally: Mr. Mountague Bernard.

> I may be permitted to observe, in passing, before taking leave of this part of the subject, that a treaty is an instrument which you cannot send to be settled in a conveyancer's chambers, nor commit to a knot of wrangling attorneys; no, not even to the family solicitor. It is an instrument in the framing of which the sensitive and punctilious self-respect of governments and nations has to be consulted, and discussion must never be suffered to degenerate into altercation; in which it is often necessary, for the sake of agreement, to accept a less finished or more accurate one; and which must be construed liberally and reasonably, according to what appears to be the true intention of contracting parties. In all this, there is no excuse for equivocal expression, and no defense of such ambiguities can be founded on it; but of apparent faults of expression it has often been, and often will be, the unavoidable cause.[2]

These expressions seem to be introduced as an apology for some intentional obscurity of language in the present Treaty. We do not so regard the matter. The history of the negotiations in this case abundantly shows that every word of the Treaty was well weighed by the British Ministers before it was signed by their Commissioners.

However this may be, if, as Mr. Bernard says, in order to conform to the delicacies of diplomatic intercourse and of international negotiation, it was necessary to employ in the Treaty *unfinished* language, *inaccurate* language, "faults of expression," to say nothing of *equivocal* language, then there is all the more reason why the United States should

[1] Mellii, Institutiones juris civilis Lusitani, lib. i, tit. 4, sec. 21.

[2] Lecture on the Treaty of Washington, May 28, 1872, London Times, May 29, 1872.

ask the Tribunal to dispel the doubts which were created by the British Commission, for the benefit of the British Government.

If, contrary to our belief, the language of the Treaty be vague or equivocal, or if it rests on understandings unwritten, the question should be judged by the Tribunal, in whose judgment both parties ought to have implicit confidence. Should the judgment involve any act *ultra vires*, then will be the time for the injured party to refuse to accept such judgment, if the injury is great enough to justify so extreme a remedy.

(*e*) The United States therefore adhere to the Treaty as of their own right; they adhere to it as the greatest, perhaps, of all modern efforts, to establish the principle of international arbitration; and they adhere to it in the sentiment of profound consideration for this august Tribunal, and for the sovereign States which have been pleased to accept their delicate duties in this behalf at the common solicitation of Great Britain and the United States.

And here we dismiss all considerations of this order, and, maintaining the competency of the Tribunal, we proceed to the question of the amount of damages claimed by the United States.

III.—MEASURE OF DAMAGES.

Rules for measuring damages.

The responsibility of the British Government having, as we think, been established as law and as fact, we shall assume also, in what follows, that that responsibility has been proved to be co-extensive with the wrong; that is, it is a responsibility for the acts of the Confederate cruisers in question to the extent of the provisions of the Treaty.

1. The next inquiry is of the application of this responsibility to the facts, and the induction of the amount of damages for each specific head of injury.

We submit the following rules of judgment in this respect:

Severity to be shown to the wrong-doer in claims founded on torts.

(*a*) When the demand of damage is founded on a tort, as distinguished from a contract, severity is to be shown toward the wrong-doer; and the losses which the injured party has suffered are to be appreciated with liberality for the purpose of indemnification.

Infractions of contract are to be anticipated, in view of the too prevalent carelessness of men in this respect, the possibility of which will, therefore, have been foreseen and taken into consideration by the other party.

But when there is violent wrong, it is a fact beyond prevision, which of course occasions more perturbation and derangement of the affairs of the injured party, and which has a character of perversity more grave than that involved in the mere non-execution of a contract. Of course, reparation should be exacted with more rigor.

The animus of the wrong-doer an element of damage.

(*b*) When the damage claimed is founded on a tort, the culpable animus of the wrong-doer constitutes an element of the question of damage. In such cases the injured party is entitled to damages beyond the amount of actual loss, in the nature of exemplary or punitive damages.

The doctrine in this respect, as understood in Great Britain and the United States, is stated by an American author as follows:

"In these actions all circumstances of aggravation go to the jury.

"The necessary result of this rule is that all the attendant circumstances of aggrava-

tion which go to characterize the wrong complained of may be given in evidence; and so it has been held, both in England and in this country. Indeed, it may be said that in cases of tort, where no fixed and uniform rule of damages can be declared, the functions of the court at the trial of the cause are mainly to the reception and exclusion of evidence when offered either by way of aggravation or mitigation, and to a definition of the line between direct and consequential damage."[1]

On this point there is unanimity of opinion among jurists, both of the common law, as in Great Britain and the United States, and of the civil law, as in the countries of the Roman law in Europe and America.[2]

The illustration of this rule, as among private persons, also applies to governments.

"In fact," says Mayne, "if any other rule existed, a man of large fortune might, by a certain outlay, purchase the right of being a public tormentor. He might copy the example of the young Roman noble mentioned by Gibbon, who used to run along the Forum, striking every one he met upon the cheek, while a slave followed with a purse, making a legal tender of the statutory shilling."[3]

(*c*) Distinctions arise in regard to the relation of the loss or damage and the act of injury, by reason of which reparation is demanded, which require attention, especially in view of the question of whether direct or indirect damages, which figures in the present case.

The relation between the injury and its cause.

This distinction is raised in various forms of expression, the party of whom damages are demanded seeking to diminish the amount by alleging that they are consequential or remote, or indirect or not immediate.

All damages are claimed as a consequence of the act of wrong, and in that sense consequential, and therefore discussion necessarily ensues as to the more or of less remoteness, or indirectness, or immediateness of the consequence.

(*d*) But each of these conditions is, of itself, uncertain, vague, and sometimes incapable of precision, which has led to the endeavor to state the doctrine with more exactness, as calling for the inquiry whether the damage complained of is the natural and reasonable result of the wrong-doer's act; and it is settled that it may be deemed of that character if it can be shown to be such a consequence as, in the ordinary course of things, would follow from those acts.[4]

Whether the natural result of the wrong-doer's act.

In truth, every cause has a series of effects; or, to speak more accurately, each effect becomes itself a cause; and so on, from cause to effect, in a longer or shorter series of alternations between cause and effect, according to the particular circumstances.

(*e*) If law-givers and jurists had been able to say that all damages for wrong should stop at the *first* effect of the cause, the definition of the rule would be less vague than it is in the common expression; but even then it would be necessary to reflect that the cause does not necessarily operate in a single line only, but frequently in several lines: it may operate in diverse directions, and produce many immediate and direct effects, as by radiation from the common centre of the *causa causans*, like a stone cast into water.

Of course, the solution of the problem becomes more and more difficult in proportion to the multiplicity of these different lines of action in which the primitive causes operate to produce effcts, which are them-

[1] Sedgwick on the Measure of Damages, p. 528.
[2] Sourdat, Traité de la Responsabilité, tom. i, p. 97; Sedgwick on Damages, ch. xviii.
[3] Mayne on Damages, p. 14. [4] Ibid., p 15.

selves new causes, and all of them the natural, not to say necessary, consequences of the one definite act of wrong.

(*f*) As a given event may be, and often is, produced by a plurality of causes working together, so may a wrong be the effect of the action of two or more persons. In such case, the injured party has right of redress against all and each of the wrong-doers, although neither of them may be morally accountable for all the injury, and some one of them may have contributed to the injury in a comparatively small degree. But it is no defense for any of the wrong-doers to say, "I did but co-operate with others, and that in a comparatively small degree, to inflict the injuries."

Whether the effect complained of be or not directly connected with the cause, whether it be proximate or remote, whether the reputed injury be or not the natural and logical consequence of the alleged act of wrong, all these are in part questions of fact, which cannot be reduced to absolute precision, but of which the competent tribunal must judge.

Thus, in the example so much discussed by writers on the civil law, suppose that the buildings, cattle, and horses of a cultivator are destroyed by the malicious or culpable negligence of another, so as to establish the right of indemnity against the author of the conflagration, how far shall the demand of damages extend?

Reparation must at least comprehend all which it costs to rebuild the farm-buildings and to procure the same number and quality of cattle and horses, and the personal inconvenience and derangement caused by the conflagration.

But the destruction of the buildings and cattle has interrupted cultivation and deprived the proprietor of his expected crop. Shall this, too, be included in the indemnity?

And the interruption of culture and the losses incidental thereto embarrass the proprietor, so that, in the course of the expenditure to which he is subjected in the purchase of materials of construction and cattle and horses, he becomes indebted; the failure of his crop deprives him of the expected means of payment; his creditors come upon him and seize and sell whatever he has, and thus he becomes ruined and reduced to absolute destitution.

All these disasters are the manifest consequence and effect of the acts of the incendiary. Is the incendiary responsible for them all? Or is he only responsible for the value of the things consumed? Are the subsequent losses, which are confessedly the natural consequences of the act of wrong, so remote or indirect as to relieve the incendiary of responsility therefor?

The law does not require that the damage recoverable shall be the *necessary* effect of the cause,—that is, an effect *impossible* to prevent; it does not require that the damage recoverable shall be the *first* effect of the cause,—but only that the damage shall have efficient cause in the act of wrong.

And the party injured is not to be deprived of redress, if he failed to employ *extraordinary* means to arrest the progress of his losses and diminish their amount, provided he took the *ordinary* steps of prudence to that end.[1]

All these, we repeat, are considerations of fact, which the competent tribunal judges according to the circumstances and which do not admit of absolute legal conclusions of law.

(*h*) Damages, reparation, indemnity, all these are terms to describe

[1] Sourdat, De la Responsabilité, tom. i, p. 96.

the same thing. Indemnity includes both *lucrum cessans* and *damnum emergens*. It includes also *moral* as well as material damage.[1] And it involves injury to persons as well as things. Damages should be an indemnity.

But, in all cases, the question of the amount of damage and its equivalent in pecuniary reparation becomes one of fact for the consideration and the equitable determination of the competent tribunal, as illustrated by the numerous cases, especially at common law, in which revision of sentence is called for on account of erroneous verdicts of damage. Whether so or not a question of fact.

2. We proceed to apply these considerations to the several heads of injury to the United States growing out of the acts of the Confederate cruisers *sub lite*, and the consequent damages due by Great Britain, discussing these points in the order in which they appear in the American Case. Application of principles.

(*a*) The United States claim indemnity for actual *property* of the Government in vessels destroyed, and for immediate *personal injuries* to the officers and crews, caused by the Confederate cruisers, the responsibility for whose acts we have in previous discussion attached to Great Britain. As to personal injuries.

In our enumeration of the particular facts, we have considered the case of each cruiser in respect of which we claim; we have proceeded to connect each of those cruisers with the British Government, so as, in our opinion, to establish its failure to fulfill the Rules of the Treaty in regard to the several cruisers; and we have treated fully the question of diligence as to each of these cruisers, as required by the Treaty Rules.

(*b*) The property destroyed consisted, first, of vessels, with their apparel, equipment, and armament, belonging to the Government of the United States. As to property of the United States destroyed.

Statements in detail of the losses of this class, officially certified either by the Secretary of the Treasury or the Secretary of the Navy, according as the vessels appertained to one or the other branch of the public service, appear in the appendix to the American Case.

There is no question here of *indirect* or *direct* damages, notwithstanding some vague suggestions to that effect in the British Counter Case.

If a ship destroyed at sea is not a case of *direct loss*, then there is no sense in language and no reason in law.

What amount of damage is due in such a case? Surely the value of the thing destroyed is the minimum of such amount, even throwing out of question the element of wrong and looking at it as one of simple negligence.

How shall the value of the thing destroyed be ascertained? We present official certificates of the value, and we confidently submit, as between governments, that such official statements are to be received as fact. The British Counter Case undertakes to contradict such official certificates by means of *opinions* of the British Admiralty. We reject all such opinions. We refuse to recognize them as available in any sense to detract from the authentic proof contained in the authoritative documents offered by the American Government.

(*c*) The United States claim indemnity in like manner for vessels and other actual property of private citizens of the United States destroyed, and for immediate personal injuries to the officers and crews, caused by Confederate cruisers, the responsibility of whose acts we have, as we think, already attached to the British Government. As to property destroyed and injuries inflicted upon citizens of the United States.

[1] Sourdat, De la Responsabilité, tom. i, p. 224.

The nature of these reclamations is explained in the American Case and in the appendix thereto, especially in the seventh volume, and in supplementary documents there will be found detailed statements, made on oath, with valuations and other particulars, for the information of the Tribunal.

The British Counter Case undertakes to control the facts thus set forth, and to do so by means of *estimates*, made by British subjects at the request of the British Government.

The Counsel of the United States respectfully submit that the claims of the United States in this behalf, vouched as they are, cannot be met by any such conjectural estimates as are put in by the British Government.

The United States, in those documents, have exhibited the value of the property captured or destroyed as the primary element and lowest measure of damage and of consequent reparation. Justice, we conceive, and the universal practice of nations, demand thus much, at least, of indemnity for wrong.

As to expenses in pursuit of the cruisers.

(*d*) The United States also claim payment of the expenses incurred by the Government in pursuit of the Confederate cruisers in question; of which expenses an account is given under the authority of the proper department of the United States.

In this case, as in that of public vessels captured, we deny that the authentic accounts of the American Government can be controlled, as the British Counter Case undertakes to do, by conjectural estimates of officers of the British Government.

We conceive this damage to come within the most rigorous rules of direct damage.

Indeed, Mr. Gladstone himself, in specifying the contents of the two classes of damage, direct and indirect, as he regards them, places the cost of pursuit in the first category.[1]

We disregard the suggestion, offered in the Counter Case of the British Government, that the United States are in fault for not having sooner captured the Alabama and Florida, or having failed to capture other cruisers of the Confederates. The injured party, as we have already argued, is not held to take *extraordinary* measures to counteract the wrongful acts of the injuring party, but only ordinary measures. The evidence in the American Case and Counter Case shows that the United States did make great efforts and a diversion of forces for suppression of the Rebellion, at a large expense, for the pursuit of the Confederate cruisers in question; but if they had made none the omission could not be justly alleged in defense by Great Britain. This very objection on the part of the British Government confirms our claim of indemnity in this behalf. If it was the duty of the United States to pursue a Confederate cruiser, this duty being imposed upon us by the culpable conduct of the British Government, surely we have a perfect right to call on Great Britain to pay the expenses of such pursuit, in which we were only protecting ourselves against the effects of the delinquencies of the British Government.

The British Counter Case argues at some length against all claims on the part of the United States on account of the Confederate cruisers, even conceding that by failure to use due diligence Great Britain shall have incurred the culpability contemplated by the Treaty Rules.

To much of this argument we have already replied, either in the statement of general propositions or in particular commentary. We proceed to make other appropriate comments thereon.

[1] See Mr. Gladstone's speech, London Times, February 7, 1872.

In reading this denial in the British Counter Case of any responsibility on the part of Great Britain, notwithstanding there should be established *legal* responsibility, we could not but reflect on what has been admitted in this respect by most intelligent members of Parliament, including successive Cabinet Ministers.

Mr. Cobden's memorable remarks on this point, while the occurrences were passing, are quoted in the American Case. We requote only his statement as to actual losses by capture as follows:

"You have been carrying on hostilities from these shores against the people of the United States, and have been inflicting an amount of damage on that country greater than would be produced by many ordinary wars. It is estimated that the loss sustained by the capture and burning of American vessels has been about $15,000,000, or nearly £3,000,000 sterling. But that is a small part of the injury which has been inflicted on the American marine."[1]

That was in 1864. Several years afterward, when there had been time for reflection, Lord Stanley said:

I have never concealed my opinion that the American claimants, or some of them at least, under the reference proposed by us, were very likely to make out their case and get their money. To us the money part of the affair is inappreciably small, especially as we have on our side counter claims, which, if only a small portion of them hold water,—and you can never tell beforehand how these matters will turn out,—will reach to a considerable amount, and form a by no means unimportant set-off to the claims preferred against us. But, I think, if matters were fairly adjusted, even if the decision went against us, we should not be disposed to grudge the payment. *The expense would be quite worth incurring, if only in order to obtain an authoritative decision as to the position of neutrals in future wars.*[2]

Mr. Forster said, in the same debate:

"They should further consider whether arbitration was the means of settling the matter. Tremendous injury had been inflicted on American citizens by means of the attacks upon their ships, and if the present misunderstanding was not settled upon a principle which would carry with it the feeling and moral sense of both countries, there was reason to fear that whenever we engaged in war we would suffer in the same way."

Earl Russell has himself said, in a passage hereinbefore quoted from the preface to the edition of his speeches:

"Great Britain might fairly grant a sum equivalent to the amount of losses sustained by the captures of the Alabama."

Will strict juridicial inquiry into the law and facts sustain the seopinions of Lord Stanley, Mr. Forster, and Lord Russell? We think it will.

First. The Treaty itself seems to require an award of pecuniary reparation. It stipulates that—

In case the Tribunal find that Great Britain has failed to fulfill any duty or duties as aforesaid, it may, if it thinks proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it, (Article VII.) It further stipulates that in case the Tribunal finds that Great Britain has failed to fulfill any duty or duties as aforesaid, and does not award a sum in gross, the High Contracting Parties agree that a Board of Assessors shall be appointed to ascertain and determine what claims are valid, and what amount or amounts shall be paid by Great Britain to the United States, on account of the liability arising from such failure, as to each vessel, according to the extent of such liability as decided by the Arbitrators. (Article X.)

All these expressions, we submit, imply an award of substantial damages and satisfaction of all losses growing out of the acts of the Confederate cruisers, provided the finding of the Tribunal, on the question of fulfillment or non-fulfillment of duty, be adverse to Great Britain.

We dismiss, therefore, the question whether or not a conviction of guilty conduct is to go without any responsibility in damages, as argued by the British Counter Case, and we do not perceive any legal force in the arguments which the Counter Case adduces to this effect.

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[1] Hansard, third series, vol. clxxv, p. 496; App. to American Case, vol. v, p. 509.
[2] Hansard, vol. cxc, p. 1150; App. to American Case, vol. v, p. 708.

The captures, it is said, were made by citizens of the United States. Of what avail here is that fact? Does the British Government intend to be understood as maintaining that all violations of neutrality on behalf of Rebels are taken out of the grasp of the law of nations? Is that to be held as the deliberate thought of Great Britain, the mistress of so many millions of discontented inhabitants of conquered States?

Alleged condonement by the United States.

Next, it is said that the United States have condoned the wrongs done to them by their Rebels, and "that they have been re-admitted to their former full participation in the rights and privileges of the Federal Constitution."

How does Great Britain know that, what right has she to know it, in a matter of Treaty obligations between the two Governments? If the consideration is of any force whatever, it strikes at the question whether Great Britain is responsible to the United States in case she did, or omitted to do, any of the actions forbidden or commanded by the Rules of the Treaty of Washington.

The Treaty does not provide by way of exception that if such acts done or committed in violation of neutral duty are done or omitted on behalf of Rebels, they shall involve no responsibility to the legitimate sovereign, or that such responsibility shall be measured by the more or less severity with which that sovereign shall see fit to treat his Rebels. On the contrary, the Rules are absolute in their terms, and adopted with specific reference to the questions of neutrality violated to the advantage of Rebels and the disadvantage of their sovereign.

Great Britain can set up no such defense. It involves considerations which she ought to have reflected on when she hastened to raise the Confederates into the status of international belligerents. In so doing she gave to them the means of doing injury to their sovereign, it is true, but for which that sovereign could and did take redress against them, when he saw fit, by exercise of the rights of war as well as the rights of sovereignty.

But Great Britain, by the course of policy she adopted, chose a condition, in which, whatever wrongs she or her subjects might suffer at the hands of the Confederates, she had no possible recourse, either against them or their sovereign; but in which she herself was responsible to that sovereign for whatever she might do in aid of such rebels, in violation of the law of nations or of Treaty.

Great Britain placed herself in that condition of her own free election, and against the will of the United States. She must take the consequences.

Her acts of actual or constructive complicity with the Confederates gave to the United States the same right of war against her as in similar circumstances she asserted against the Netherlands.

The arbitration substitutes damages in the place of reparation by war.

We, the United States, holding those rights of war, have relinquished them to accept instead the arbitration of this Tribunal. And the Arbitration substitutes correlative legal damages in the place of the right of war.

This proposition is unequivocally admitted in the Counter Case as follows:

Reply to arguments in the British Counter Case.

> Her Majesty's Government readily admits the general principle that, where an injury has been done by one nation to another, a claim for some appropriate redress arises, and that it is on all accounts desirable that this right should be satisfied by amicable reparation, instead of being enforced by war. All civil society reposes on this principle, or on a principle analogous to this; the society of nations, as well as that which unites the individual members of each particular commonwealth.[1]

[1] Page 130.

The principle being thus admitted, no casuistry can serve to prevent its application to the present claims of the United States.

That, as the Counter Case suggests, the instruments of the injury done were the cruisers and their officers and crews, is immaterial to the question. Responsibility for the acts of those cruisers, by the very terms of the Treaty, is imposed on Great Britain, if she be found in fault according to the agreed Rules.

If it were otherwise, then no responsibility could ever devolve on any Government for breaches of neutrality produced by its neglect; for the Government is not *in its own person* the actual cruiser which sinks and burns; it is, however, the constructive captor by the spirit and the letter of the Treaty.

The British Counter Case argues that Great Britain ought not to be held responsible for all the acts of the cruisers during the entire voyage of each, because they enjoyed hospitality in ports of other countries. Unfortunately for the argument, Great Britain never did anything to stop the cruisers, as she did in the affair of Terceira; she continued to allow them to obtain supplies in her ports to the last, without which they could not have kept the seas; and although with knowledge of the positive guilt of the cruisers, by reason of their violation of her laws, she persisted in treating them as legitimate cruisers, when she might and should have arrested them whenever they entered into her jurisdiction, or have forbidden them to re-enter and practically outlawed them, as Brazil did, to punish the lesser act of abusing the hospitality of the Empire. But the neglect of duty on the part of Great Britain continued as to most, if not all, the cruisers of the Confederates to the very end.

The Counter Case argues that losses and specific captures, actually suffered by the United States, are not to be indemnified, because the liability of Great Britain disappears "among the multitude of causes, positive or negative, direct or indirect, distant or obscure, which combine to give success to one belligerent or the other." If this argument were adduced to the question of the responsibility of Great Britain to the United States for the prolongation of the Rebellion, we could comprehend its meaning without admitting its application or force. But as applied to actual captures, and the loss thereby produced, the argument seems to be destitute of reason. On such premises no belligerent could be held to restitution of a wrongful capture, and no neutral could ever be held responsible toward either belligerent; for a "multitude" of secondary facts always enter into every discussion of responsibility for wrong, and especially for wrongs in time of war. The common sense of mankind oversteps all such immaterial incidents, and goes direct to the prime *author* of the wrong; the Government which wrongfully did, or wrongfully permitted, the act impugned, the expedition from her ports of the "floating fortress," as the Counter Case properly calls the wrong-doing instrument of the guilty Government.

Claims like the present, says the Counter Case, have rarely been made, and, as the British Government thinks, never conceded or recognized.

It might suffice to reply that no such case, on so large a scale, has ever occurred, except in the controversy between Great Britain and France in 1776, and then Great Britain declared war. But the precise question arose and was duly adjusted between the United States and Spain. And the relations of Governments do not depend on mere precedent, but still more on right.

The Counter Case deprecatingly doubts whether "the greatness of the loss is to be regarded as furnishing the just measure of reparation without regard to the venial character of the default."

We deny that there is here any *actual* question of default of "venial character." The defaults charged, and, as we think, the defaults proved, are grave, serious, *capital*. And we deny that there is any *possible* question of the "venial character of the defaults," or that the loss can be measured by any such consideration. Punishment by penal laws may be graduated in this way, according to the greater or less degree of guilt; but indemnity for wrong cannot be: if you destroy my ship, my house, or my horse, by culpable carelessness, it is no answer to say that you might have been more careless—nay, that you might have acted with deliberate malice.

Indemnity should follow injury.

If there be responsible wrong, whether it be the greatest possible wrong, or a degree less than the greatest possible, still the indemnity follows as a legitimate and just consequence. Such, indeed, is the tenor of the Treaty, which attaches responsibility to mere want of "due diligence," and does not require that Great Britain should have been guilty of the utmost conceivable degree of willful negligence which could by possibility be committed by any Government.

Award of a sum in gross.

(*f*) The Case of the United States desires the Tribunal to award a sum in gross in reparation of the losses complained of; and the Counsel request this, assuming the Tribunal shall be fully satisfied that the said losses are properly proved indetail, and that the sum total thereof, as claimed, is due by Great Britain.

It should include interest.

In that contingency the Counsel assume that interest will be awarded by the Tribunal as an element of the damage. We conceive this to be conformable to public law, and to be required by paramount considerations of equity and justice.

Numerous examples of this occur in matters of international valuation and indemnity.

The case of the Canada.

Thus, on a recent occasion, in the disposition by Sir Edward Thornton, British Minister at Washington, as umpire, of a claim on the part of the United States against Brazil, the umpire decided that the claimants were entitled to interest by the same right which entitled them to reparation.[1] And the interest allowed in this case was $45,077, nearly half of the entire award, ($100,740.)

Award under the Treaty of Ghent.

So in the case of an award of damages by the Emperor of Russia in a claim of the United States against Great Britain, under the Treaty of Ghent, additional damages were awarded in the nature of damages from the time when the indemnity was due.[2] In that case Mr. Wirt holds that, according to the usage of nations, interest is due on international transactions.

Award under the Jay treaty.

In like manner, Sir John Nicholl, British Commissioner in the adjustment of damage between the United States and Great Britain, under the Jay Treaty, awards interest, and says:

> To re-imburse to claimants the original cost of their property, and all the expenses they have actually incurred, *together with interest on the whole amount*, would, I think, be a just and adequate compensation. This, I believe, is the measure of compensation usually made by all belligerent nations for losses, costs, and damages occasioned by illegal captures.[3]

Contingent reference to assessors.

(*g*) If the Arbitrators are not satisfied with the proofs presented by the United States, and entertain doubt as to the sums to be awarded in each case of private loss occasioned by Confederate cruisers, as to which the responsibility of the British Government

[1] Indemnity case of ship Canada, United States Documents, December 15, 1870, p. 153.

[2] Opinion of Attorney-General of the United States, vol ii, p. 20.

[3] Ibid., p. 31. See also Story, Conflicts of Laws, § 307.

attaches according to the Rules of the Treaty, then the Counsel of the United States respectfully submit that it may be the duty of the Tribunal, after finding the fact of the fault of Great Britain in the premises, to refer the assessment of the damages to the Assessors provided for by Article X of the Treaty, with such instructions as to the extent of the liability as the Tribunal shall see fit to give to such Assessors.

We cannot admit that Great Britain shall appoint *ex-parte* Assessors to control the statements and proofs of the United States. That she in effect undertakes to do in the arbitrary estimates of officials or private persons contained in her Counter Case, as in the nature of proofs contradictory of the official statements and private affidavits or other proofs presented by the United States. If these formal statements on the part of the United States do not suffice, and estimates are needed, the Counsel of the United States respectfully insist that such assessments must be made by the official Assessors of the Treaty.

(*h*) In the Appendix to this Argument will be found special discussion of the merits of these claims of private persons with reference to the criticism of the British Counter-Case thereon, to which we respectfully solicit the attention of the Tribunal. (See Appendix to this Argument, Note D.)

Claims of private persons.

We come now to the class of claims, some private, some general, which in recent discussions between the two Governments are objected to by Great Britain as being "indirect."

The indirect claims.

These are:

(1) The enhanced rates of insurance in the United States, occasioned by the Confederate cruisers in question, involving great pecuniary loss to the citizens of the United States.

Enhanced rates of insurance.

Certain it is, this injury was actual, and a loss "growing out of the acts" of the Confederate cruisers by necessary relation of cause and effect, and it followed immediately on the appearance of those cruisers.

(2.) Transfer of the maritime commerce of the United States to Great Britain.

Transfer of United States commerce to British flag.

This was a *national* loss "growing out of the acts" of the cruisers, and having them for its distinct and sole cause.

It was a loss to the United States constituting gain to Great Britain. We do not say that she was culpably negligent of the obligations of neutrality *in order* that she might thus gain thereby, but we do say that the loss to us, and the gain to her, were the necessary and immediate effect of her negligence in that respect.

(3.) The prolongation of the war of Rebellion in the United States.

Prolongation of the war.

The admitted gravity of the injury thus suffered by the United States, and the supposed enormous magnitude of the sum requisite to indemnify the United States in the premises, have caused this head of claim, as stated in the American Case, to be conspicuous in the recent discussions between the two Governments, and to become the subject of special commentary on the part of eminent publicists and public men in Europe.

It is the claim which presents itself to the minds of all as the "indirect claims" of the United States.

Whatever we may further have to say regarding the distinction of *indirect* and *direct*, in the consideration either of the general or of the particular question of damages, we desire to have regarded as applicable mainly to this claim.

In stating our views of the general subject of damages we frankly recognized the existence of the distinction in law between damages

proximate or direct and damages remote or indirect, admitting the force and the validity of the distinction.

Whether too remote for consideration to be determined by the tribunal.

But we took care to state at the same time that the distinction is altogether uncertain, not to say, in many cases, shadowy; that the dividing line can no more be drawn in the abstract than the line between the contiguous colors of the spectrum; and that in private controversies the attempt to make the discrimination generally results in a question of fact for the determination of the competent tribunal.

The idea is well expressed by Mr. Pradier Fodéré, as follows:

Views of M. Pradier Fodere.

Mais l'élévation des primes d'assurance amenée par les déprédations certaines et répétées de corsaires, mais la prolongation de la guerre due aux succès de ces derniers, pourraient être, sans trop forcer l'appréciation, considérées comme des suites prochaines, et, sinon nécessaires et uniques, du moins naturelles, de la faute du neutre. Il y a là, du reste, une série de considérations à peser, à étudier. La règle absolue, c'est qu'on ne peut équitablement et raisonnablement imposer la responsabilité des dommages indirects. Mais étant donnés tels dommages causés et éprouvés, quels d'entre eux sont directs, quels sont indirects? On ne peut pas le dire d'avance: c'est une question à examiner, en descendant dans les détails et en discutant les causes de chaque dommage.[1]

What M. Pradier Fodéré says in this respect is fully justified by all the special discussions of the question in the jurisprudence of Great Britain and the United States, as well as of other countries of Europe and America. The well-considered treatise of Mr. Mayne, and the still ampler and more complete treatise of Mr. Sedgwick, contain abundant proof on this point.

The Counter Case of the British Government exhibits an apt illustration of this point, in arguing that even the claims for property actually destroyed by the Alabama are indirect claims, and therefore to be rejected by the Tribunal. It is not worth while to add to what we have already said on that argument. We suppose it assumes that negligence is the cause and *escape* the direct effect, so that the captures are the indirect effect; which is equivalent to saying that he who by malice or gross negligence discharges a loaded gun into a crowd is not responsible for the deaths or wounds he inflicts, because the injury done is the effect of the action of the ball, which is a secondary cause, and not of the act of negligence or malice which did but apply a match to the gun.

General considerations.

The Counsel of the United States would not need to have recourse to any such subtleties to show that the acts of the Confederate cruisers inflicted an injury on the United States in contributing to the prolongation of the war, and that such injury was a direct injury of Government to Government. Nor would it be any answer to say that this injury was but a contributing fact among other and even greater causes of the damage.

Nor would it suffice to reply that the exact amount of the damage is difficult to fix. When a traveler is injured by reason of want of due diligence on the part of the managers of a railroad, it is no defense to say that it is difficult to fix the true value of his arm or his leg, or the money compensation of a long fit of sickness. That is a problem, like others of the same nature, which finds its solution every day in the ordinary courts of justice of all countries.

One nation invades another, and inflicts losses by acts of war on land. If they choose to make peace on the condition of the invader indemnifying the losses of the invaded, the sum which ought to be paid is debatable; but certainly it can be determined. So if two co-operating nations invade another, the sum of injury done by one of them as dis-

[1] Pradier Fodéré, *La question de l'Alabama*, p. 37.

tinguished from the other is determinable, if not with exactness, yet approximately, like most other unliquidated damages; to say nothing of the question of exemplary damages in the cases of tort, which run together in the discretion and conscience of the competent tribunal.

But there is war on sea as well as on land. A war may be exclusively maritime, like that between France and the United States. Such a war consists in the combat or capture of ships. Yet such a war inflicts national injuries and losses independent of the value of vessels destroyed, and if terminated by the payment of indemnities for the cost of the war, either by one or by several parties belligerent, the sum of the reparation can be calculated and determined.

Such is the relative predicament of Great Britain and the United States. We have been injured as a nation by acts of a maritime war happening, as the Counsel think they have proved, by the culpable and responsible negligence of the British Government. The wrong is direct as between the two nations.

We think we have distinct right of substantial indemnity in this behalf.

When a nation inflicts a wrong on a nation, is it due reparation to pay the price of certain ships destroyed? Surely not, any more than the fine paid by the wealthy Roman to repair the insults he inflicted on every person he met in the forum.

But considerations of large import in the sphere of international relations, of which the Government of the United States is the rightful judge, forbid their Counsel to press for extreme damages on account of the national injury thus suffered by the nation itself, through the negligence of Great Britain. Nevertheless, holding that in view, we have maintained in this Argument the plentitude of the jurisdiction of the Tribunal, because, in the judgment of the United States, such is the tenor and intent of the Treaty of Washington; and because they desire the judgment of the Tribunal on this particular question, for their own guidance in their future relations with Great Britain.

United States do not desire extreme damages.

The jurisdiction of the question belongs to the Tribunal.

They contend that the question of damages, as whether direct or indirect, is a juridical one, not one of the Treaty.

The United States did not insist on the absolute generality of scope which distinguishes the Treaty, with unreasonable expectations of having extravagant damages awarded by the Tribunal. Their object was a higher one, and one more important to them, and, as they conceived, to Great Britain.

It is not for their interest to exaggerate the responsibilities of neutrals; but only, in the sense of their action in this respect throughout their whole national life-time, to restrain the field of arms and enlarge that of peace, by establishing the rights and the duties of neutrality on a basis of truth and justice, beneficial in the long run to all nations.

If, as a juridical question under this Treaty, the Tribunal shall conclude that Great Britain is not bound to make reparation to the United States for general national injuries occasioned by the negligence of the British Government to fulfill neutral obligations in the matter of Confederate cruisers, it will say so; and, in like manner, if, as a juridical question, under the Treaty, the Tribunal shall conclude to the contrary and award damages in the premises, the United States will accept the decision as a final determination of the fact and the public law of the questions arising under the Treaty.

The United States desired that the Treaty should be a full and final

Without an adjudication upon it there will not be a full settlement of all differences.

settlement of all differences between the two nations, which it would not have been if the larger national claims, so long and so steadily insisted on by us, had been excluded from the scope of the Treaty, and so left to be a recurring subject of grief and offense in the minds of the people of the United States. They desired also that great principles of neutral obligations and neutral duty should issue from this High International Tribunal, representing five great Constitutional Nations, to serve as instruction and example to all nations, in the large interests of civilization, of humanity, and of peace.

We, the Counsel of the United States, have acted accordingly, in the advocacy of the rights of the United States; earnestly and positively maintaining the principles involved in this Arbitration, but regarding the mere question of the amount of *national* damages to be awarded as secondary to the higher consideration of the welfare and the honor of the United States.

Conclusion.

We now bring to a close this Argument on behalf of the United States, "showing the points and referring to the evidence" which we think should lead to an award by the Tribunal of reparation and indemnity from Great Britain, commensurate with the injuries the United States have suffered and the redress they are entitled to demand.

We shall not find in recent history any example of two powerful nations, with so weighty a matter of difference between them, submitting the measure of right and wrong, of injury and redress, in the great controversy, to any intermediary arbitrament. When their own reason and justice did not enable them to concur in accepting a fit solution of the grave dispute it has too often been left to work ill-will and estrangement between them, or led to open rupture of their peace.

The benevolent and sagacious counsels of the two governments have triumphed over the obstacles and resisted the dissuasions which have heretofore proved too strong to be overcome, and the success of this great example, so full of promise of peace and justice among nations, now rests with the Tribunal.

In the wise administration of this elevated and benign trust, for the welfare of the world confided to this august Tribunal, the Arbitrators will find no surer guide or support than a consideration of the ill consequences which would follow from a disappointment of the high hopes which, on all sides, attend this great experiment.

So far as the parties to this controversy are concerned, they are equally interested that the award should receive the moral acceptance of the people of both nations, as an adequate and plenary settlement of the matter of difference between them.

The people of the United States have definitely formed their opinions as to what the action of Her Majesty's Government, now under judgment, was, as matter of fact, and as to the magnitude and permanence of the injuries which they, their property, and their prosperity, have suffered therefrom. They naturally look, therefore, with chief interest to the award of this Tribunal as a decision upon the question of the *rightfulness* of such action of Her Majesty's Government, and by consequence of the rightfulness of such action in the future, should occasion arise for its imitation by the United States or other Powers.

This principal question having been determined, if Great Britain is held responsible for these injuries, the people of the United States expect a just and reasonable measure of compensation for the injuries

as thus adjudicated, in the sense that belongs to this question of compensation, as one between nation and nation.

The disposition of this controversy by the Tribunal upon principles adequate to its profound interest to the Parties, and in the observant eyes of other nations, gives the best hope to the civilized world of a more general adoption of the arbitrament of reason, instead of force, in the disputes of nations.

And for the rest, the permanent and immutable principles of JUSTICE are adequate for this, as for every other, situation of human affairs; for this, as for every other, Tribunal instituted in its name and for its maintenance. Justice—universal, immutable Justice—is wholly indestructible by the changing fortunes of States or by the influence of all-devouring time,

Casibus haec nullis, nullo delebilis aevo.

In this spirit we humbly submit the whole subject to the enlightened judgment of the Tribunal.

C. CUSHING.
WM. M. EVARTS.
M. R. WAITE.

APPENDIX.

NOTE A.—OBSERVATIONS ON CERTAIN SPECIAL CRITICISMS IN THE BRITISH COUNTER CASE ON THE CASE OF THE UNITED STATES.

I.—THE BRITISH FOREIGN ENLISTMENT ACTS.

British Foreign Enlistment Acts.

On the eighth page of the British Counter Case it is said: "The following sentence is given as a quotation from a dispatch signed by Earl Russell: 'That the Foreign Enlistment Act, which was intended in aid of the duties * * * of a neutral nation,' &c. What were the words of Earl Russell? They were these: 'That the Foreign Enlistment Act, which was intended in aid of the duties *and rights* of a neutral nation, can only be applied,' &c. The meaning of the sentence is altered by leaving out two of the most important words."

The Counsel of the United States are unable to discover how the insertion of the omitted words would increase or decrease, modify or affect, the proposition that the Foreign Enlistment Act was intended in aid of the duties of a neutral nation as represented by the United States.

On the same page of the British Counter Case it is further said:

"The report of the Commission appointed in 1867 to consider the laws of Great Britain available for the Enforcement of Neutrality is thus referred to: 'The Tribunal of Arbitration will search the whole of that Report and of its various appendices in vain to find any indication that that distinguished body imagined or thought or believed that the measures which they recommended were not in full conformity with international obligations. On the contrary, the Commissioners say that so far as they can see, the adoption of the recommendations will bring the municipal law into full conformity with the international obligations.' Viewing their acts in the light of their powers and their instructions, the United States feel themselves justified in asking the Tribunal to assume that that eminent body regarded the acts which they proposed to prevent by legislation as forbidden by international law. What is the passage which the Government of the United States have referred to, but have refrained from extracting? It is this: '*In making the foregoing recommendations we have not felt ourselves bound to consider whether we were exceeding what could be actually required by International Law*, but we are of opinion that if those recommendations should be adopted, the municipal law of this realm available for the enforcement of neutrality will derive increased efficiency and will, so far as we can see, have been brought into conformity with your Majesty's international obligations.' Thus by leaving out the words in which the Commissioners observe that their recommendations may exceed the requirements of International Law, and by using in one sense words which (as the context proves) they employed in another, they are represented as saying the very thing which they expressly guarded themselves from being supposed to say, namely, that all the acts which they proposed to prohibit were, in their judgment, already forbidden by international law."

The United States accept without hesitation the issue thus raised by Her Majesty's Government, and they maintain that the language quoted in the British Counter Case does not justify the statement that the Commissioners observe, that their recommendations "*may exceed the requirements of international law.*"

The Commissioners did not say this, nor anything which in any "sense" gathered from the "context," by any rule of interpretation, can be construed into the meaning which is attributed to it in the British Counter Case. They did use the exact language quoted in the American Case. They said that, if their recommendations should be adopted, the municipal law of Great Britain would, so far as they could see, have been brought into conformity to international obligations. They also said that, in making those recommendations, they had not felt themselves bound to consider whether they were exceeding what could be actually required by international law. In other words, they said that although it seemed to them that, while the proposed recommendations were in harmony with existing international obligations, yet they did not found the recommendation on that fact, but on its own intrinsic merits. The Arbitrators will judge whether this is not the fair and reasonable construction of the language.

II.—AMERICAN NEUTRALITY IN 1793–'94.

American neutrality in 1793–'94.

It is said on page 10 of the British Counter Case that "it is pleaded that in 1793, during General Washington's Administration, the representative of Great Britain in the United States pointed out to Mr. Jefferson, who was then Secretary of State, acts *'which were deemed by Her Britannic Majesty's Government to be breaches of neutrality* done in contravention of the President's Proclamation of Neutrality,' and he invited the United States to take steps for the repression of such acts, and for the restoration of the captured prizes," and that "it appears that the United States complied with these requests." It will be seen that the representations then made on the part of this country to the United States were founded on the character of the acts themselves, which were deemed by the British Government to be breaches of neutrality, and not upon the fact that they were prohibited by the President's Proclamation."

The letter from Mr. Hammond to Mr. Jefferson, which will be found on pages 240–41 (No. 6) of the fifth volume of the British Appendix is the best reply to this averment. The Minister of Her Britannic Majesty says to the American Secretary of State that he "does not deem it necessary to enter into any reasoning upon these facts, as he conceives them to be breaches of that neutrality which the United States profess to observe, *and direct contraventions of the proclamation which the President issued on the 22d of last month.*" The United States submit that this letter is a complete justification of this allegation in their case which is contested by Her Majesty's Government.

Again, on page 29 of the British Counter Case, referring to the commission appointed under the seventh article of "Jay's Treaty," to ascertain the amount to be paid to Great Britain by the United States, it is said:

"Three leading decisions pronounced by them will be found in the Appendix to this Counter Case. By these decisions it was ruled:

"1. That according to the true construction of Article VII of the Treaty, *coupled with Mr. Jefferson's letter*, no claim could be made on account of a capture made before the 5th of June, 1793.

"Hence, compensation was refused in the case of a British vessel which had been captured on the 8th of May, by the Sans-Culottes, a privateer fitted out in Charleston, and had been openly brought by her captors into the port of Philadelphia.

"2. That no compensation would be made by vessels illegally fitted out within the jurisdiction of the United States, unless the prizes had been subsequently brought into an American port. The owners, therefore, of a vessel which the captors had destroyed at sea were entitled to no compensation.

"3. That where the prize has been brought in, no compensation could be claimed, if the claimant had not taken proceedings in a District Court of Admiralty, and proved his case there by sufficient testimony, or if there had been any negligence or any delay in instituting or carrying on such proceedings, or in enforcing the judgment if obtained.

"And it is said, on page 31, referring to what had been said by the United States in this case concerning this precedent: 'Her Majesty's Government deems itself entitled to ask whether these are correct representations of the facts stated in the foregoing pages.'"

The first point referred to in the Counter Case of Her Majesty's Government is, it will be perceived, an adjudication by the tribunal as to the extent of its jurisdiction, *i. e.*, that it did not extend to cases arising before the 5th day of June, 1793. The United States did not suppose that this point would be questioned by Her Majesty's Government. They are at a loss to understand exactly what is intended by Her Majesty's Government in its remarks in respect to this point. The United States, in their Case, (on page 129,) say that Mr. Hammond was informed on the 5th of June, 1793, that "*as to restoring the prizes it* could not be done;" and on page 130, it is said that the United States Government also determined at that time as to the fitting out of privateers, that "it was its duty to repress them *in future*," and "to restore prizes that might be captured," &c., "or if unable to restore them, to make compensation for them."

The reasons for this distinction drawn between acts committed before, and those committed after, June 5, 1793, were fully and fairly stated by Lord Tenterden in his memorandum which is to be found in the third volume of the British Appendix, and the United States had supposed that no historical fact was better settled than that the British Government at that time and ever since had acquiesced in the propriety and the justice of the distinction drawn by General Washington.

When the United States made their statement now challenged, although they took the precaution to indicate that it referred to captures made after June 5, 1793, they might have assumed that it would have been so construed without that precaution.

The second proposition, on the twenty-ninth page of the British Counter Case, is to be taken in connection with the other controlling and limiting remarks in the statement of the commissioner who rendered the decision.

There was in the Case no allegation of permission or neglect by the Government of the United States as to the arming of the French cruiser. The commissioner said:

"The Counsel for the claimant seemed to suppose that the obligation to compensate arose from the circumstance of the privateer having been originally armed in the United States. But as there is not the smallest evidence to induce a belief that in this or in any other case the Government permitted, or in any degree connived at, such arming, or failed to use all the means in their power to prevent such equipment, there is no ground to support a charge on the fact that the armament originated in their ports."

In view of the fact that this very material qualification of the doctrines laid down in the case of the Jamaica is excluded from the British Counter Case, the United States think they are justified in repeating as to the statements in the British Counter Case, the question there propounded by Her Majesty's Government, whether these are correct representations of the facts.

As to the third proposition, on the twenty-ninth page of the British Counter Case, the United States refer to the opinion in the case of the Elizabeth, (British Appendix, volume v, pp. 319–328,) upon which it is said to be founded, which in the opinion of the United States forms no adequate or just foundation for the assertion that it was there decided that no compensation could be claimed "if there had been *any negligence or any delay* in instituting or carrying on proceedings in a district court of admiralty," or if *the claimant* "had not proved his case there by sufficient testimony," or if there had been "delay in enforcing a judgment if obtained." The Tribunal will also judge whether this is a correct representation of the facts.

III.—THE UNITED STATES AND PORTUGAL.

United States and Portugal.

On pages 32 and 33 of the British Counter Case will be found an extract from a letter from Mr. da Serra, Portuguese Minister at Washington, to the Secretary of State of the United States, dated November 23, 1819; and, commenting upon this extract, it is said on page 33 that—

"In the Case of the United States, the Minister who writes thus earnestly and vehemently is represented as attaching little or no importance to the matter. The reason given is that he has chosen the moment to make a visit to Brazil. But in the sentences which precede and follow, and of which no notice is taken in the Case of the United States, he has explained why he chose to leave his post at that particular time, namely, that until, by amendment of the law or otherwise, the proper means should be found for putting an end to this 'monstrous conspiracy,' he found by experience that complaints were useless, and should refrain from continuing to present them without positive order."

The statement in the Case of the United States which is thus commented upon was the following:

"On the 23d of November, 1819, the Minister again complained. He says: 'One City alone on this coast has armed twenty-six ships which prey upon our vitals, and a week ago, three armed ships of this nature were in that port waiting for a favorable occasion of sailing for a cruise.' But he furnishes no facts, and he gives neither proof nor fact indicating the city or the district which he suspected, and nothing to afford the Government any light for inquiry or investigation. On the contrary, he says: '*I shall not tire you with the numerous instances of these facts;*' and he adds, as if attaching little or no real importance to the matter, 'relying confidently' on the successful efforts of this Government, I choose this moment to pay a visit to Brazil." (American Case, p. 143.)

The first fact that will strike the Tribunal is that in this statement assailing the fairness of the analysis of this letter which is given by the United States, the extract at the close of the United States analysis is not to be found. In fact, the British Counter Case omits the following paragraphs of Mr. da Serra's letter, which, in the judgment of the United States, are the paragraphs the most essential in this controversy:

"The Executive, having honorably exerted the powers with which your Constitution invests him, and the evil he wished to stop being found too refractory, it would be mere and fruitless importunity if I continued with individual complaints except by positive orders. This Government is the only proper judge of what constitutional depositions or arrangements may be established for the enforcement of the laws, and he alone has the means of obtaining them, which are constitutionally shut to any foreign minister. I trust in the wisdom and justice of this Government that he will find the proper means of putting an end to this monstrous infidel conspiracy, so heterogeneous to the very nature of the United States.

"Before such convenient means are established, the efforts of a Portuguese Minister on this subject (the only one of importance at present between the two nations) are of little profit to the interests of his Sovereign. Relying confidently on the successful efforts of the Government to bring forth such a desirable order of things, I choose this moment to pay a visit to Brazil, where I am authorized by His Majesty to go. My age

and my private affairs do not allow much delay in making use of this permission, and I intend to profit by the first proper occasion that may offer." (British Appendix, volume iii, page 155.)

The United States submit to the Arbitrators that the letter of Mr. da Serra, when completed by adding the passage omitted in the British Counter Case, justifies the statement made in their Case.

1. It refers to representation made "during more than two years" previously. This reference to what had already been noticed in the analysis in the American Case it was not necessary to repeat.

2. It makes an averment as to twenty-six ships armed in one city, and as to three armed ships which were said to be in that port the previous week. This averment is given in the American Case in Mr. da Serra's own language.

3. It says that Mr. da Serra will not tire Mr. Adams with the numerous instances of the facts, but he gives a reason for this which is omitted in the British Counter Case, namely, that while he is sick of receiving communications of Portuguese property stolen, he recognizes that the Government of the United States has been sincere in its desire to suppress what he complained of, and has exerted itself as much as it could to that end.

4. The United States cannot be said to have represented Mr. da Serra as attaching little or no importance to the matter. "What they actually said was," he adds, *as if* attaching little or no importance to the matter, "relying confidently on the successful efforts of this Government, I choose this moment to pay a visit to Brazil," and they submit that he certainly did not do what it said in the British Case that he did do, "Explain why he chose to leave his post at that particular time, namely, that until, by the amendment of the law or ortherwise, the proper means should be found for putting an end to this 'monstrous conspiracey,' he found by experience that complaints were useless, and should refrain from continuing to present them without positive orders."

IV.—NASSAU IN DECEMBER, 1861, AND JANUARY, 1862.

On page 62 of the British Counter Case, it is said:

"It may, however, be convenient, since the Government of the United States has charged Earl Russell with having neglected to make inquiry and contented himself with announcing 'a condition of affairs at Nassau' which was 'imaginary,' to state what was actually done by Earl Russell upon the receipt of Mr. Adams's representation, what had been previously done, and what were the facts existing at the time." Nassau.

The allegation that "the United States have charged Earl Russell with having neglected to make inquiry, and contented himself with announcing a condition of affairs at Nassau which was imaginary," is itself an imagination. The United States did not deny that Earl Russell made an inquiry. They said that had Earl Russell *seriously* inquired into the complaints of Mr. Adams, a state of facts would have been disclosed entirely at variance with the report which Earl Russell, on the 8th day of January, 1862, sent to Mr. Adams as a correct statement of what was taking place at Nassau, and that that statement was imaginary. The facts which are shown prove this. Mr. Adams, on the 8th day of October, 1861, transmitted to Earl Russell a letter showing that "a quantity of arms and powder," for the use of the insurgents, was "to be shipped to Nassau," consigned to Henry Adderley. Earl Russell answered this complaint on the 8th day of January, 1862, by saying that the Lieutenant Governor of the Bahamas had received a letter from Mr. Adderley denying the allegations brought against him, and that the receiver-general at Nassau said that no warlike stores had been received at that port. The United States proved in their Case that on the 8th day of January, warlike stores had arrived in Nassau, and had been transshipped. Her Majesty's Government, in its Counter Case, has since proved the same thing more in detail. On the 12th December, Lieutenant Governor Nesbitt knew of the consignment. (British Appendix, vol. v, p. 27, No. 8.) On the 28th December, he knew of the transshipment. (Same, No. 9.) It is clear, therefore, that the averment of the United States that the "condition of affairs at Nassau," as announced by Earl Russell on the 8th of January, was "imaginary" is correct. Whether the inquiries of Earl Russell were "seriously" prosecuted, the United States leave to the Arbitrators to decide, on a comparison of dates. The complaint by Mr. Adams was made on the 1st of October, 1861. (United States Evidence, vol. i, p. 520.) The instructions to the Lieutenant Governor to make the investigation were dated the 15th October. (British Appendix, vol. v, p. 26.)

The inquiry of Adderley was made on the 16th November, and the answer communicated to London on the 20th November. On the 9th day of December the Gladiator arrived, with palpable proof that the answer of the 20th November had misinformed Her Majesty's Government. Between that day and the 8th January, the date of Earl Russell's note to Mr. Adams, there was plenty of time to have given Her Majesty's Government correct information, which was not "imaginary." That was either not done, or if done it was never communicated to the Government of the United States.

On page 65 it is said:

"It might have been reasonably supposed, therefore, that the course pursued by the authorities at Nassau in the case of the Flambeau and her coal ships, would have merited the approval of the Government of the United States instead of being denounced as a violation of neutrality. * * What, then, is the grievance of the United States? It is that the United States cruisers were precluded from using the Bahamas for belligerent operations."

The United States cannot permit themselves to characterize this statement as it deserves. They do not complain that they were "precluded from using the Bahamas for belligerent operations," but they do complain, and they assert that they have proved, that the insurgents were encouraged to use all the British ports for such operations.

NOTE B.—EXTRACTS FROM VARIOUS DEBATES IN THE PARLIAMENT OF GREAT BRITAIN REFERRED TO IN THE FOREGOING ARGUMENT.

I.—THE FOREIGN-ENLISTMENT ACT OF JULY 3, 1819.

Debates in Parliament on the passage thereof.

In the House of Commons, 15th May, 3d, 10th, 11th, and 21st June, 1819. (See Hansard's Parliamentary Debates, first series, vol. xl, pp. 362–374, pp. 867–909, pp. 1084–1117, pp. 1118–1125, pp. 1232–1285.)

Foreign Enlistment Act of July 3, 1819.

In the House of Lords, 28th June, 1819. (See ibid., pp. 1317–1416.)

On May 13, 1819, the Attorney General moved for leave to bring in a bill to prevent enlistments and equipments of vessels for foreign service. He said:

"He wished merely to give this country the right which every legitimate country should have, to prevent its subjects from breaking the neutrality existing toward acknowledged states, and those assuming the power of any states. It was in the power of any state to prevent its subjects from breaking the neutrality professed by the Government, and they were not to judge whether their so enlisting would be a breach of neutrality or not." (Pp. 362, 363.)

He said further:

"The second provision of this bill was rendered necessary by the consideration, that assistance might be rendered to foreign states through the means of the subjects of this country, not only by their enlisting in warfare, but also by their fitting out ships for the purpose of war. It was extremely important for the preservation of neutrality, that the subjects of this country should be prevented from fitting out any equipments, not only in the ports of Great Britain and Ireland, but also in the other ports of the British dominions, to be employed in foreign service. The principle in this case was the same as in the other, because by fitting out armed vessels, or by supplying the vessels of other countries with warlike stores, as effectual assistance might be rendered to a foreign power as by enlisting in their service." (P. 364.)

Sir James Mackintosh, opposing the bringing in of the Bill, said:

"It was impossible to deny that the sovereign power of every state could interfere to prevent its subjects from engaging in the wars of other states, by which its own peace might be endangered, or its own interests affected. His Majesty could command his own subjects to abstain from acts by which the relations of the state with other states might be disturbed, and could compel the observation of peace with them." (P. 366.)

Lord Castlereagh, favoring the bringing in of the Bill, said:

"It now became us to adopt a measure by which we might enforce the common law against those whose conduct would involve us in a war, and to show that we were not conniving, as we were supposed, with one of the parties." (P. 369.)

Leave was given to bring in the Bill. (P. 374.)

On June 3, 1819, the Attorney moved the second reading of this Bill, and said:

"Such an enactment was required by every principle of justice; for when the state says, 'We will have nothing to do with the war waged between two separate powers,' and the subjects in opposition to it say, 'We will, however, interfere in it,' surely the house would see the necessity of enacting some penal statutes to prevent them from doing so; unless, indeed, it was to be contended that the state and the subjects who composed that state might take distinct and opposite sides in the quarrel. He should now allude to the petitions which had that evening been presented to the house against the bill; and here he could not but observe that they had either totally misunderstood or else totally misrepresented its intended object. They had stated that it was calculated to check the commercial transactions and to injure the commercial interests of the country. If by the words 'commercial interests and commercial transactions' were meant 'warlike adventures,' he allowed that it would; but if it were intended to argue that it would diminish a fair and legal and pacific commerce, he must enter his protest against any such doctrines. Now, he maintained, that as war was actually carried on against Spain by what the petitioners called commercial transactions, it was the duty of the house to check and injure them as speedily as possible." (P. 875.)

Mr. Denman, opposing the bill, said:

"He was perfectly at a loss to conjecture by what ingenuity the honorable and learned gentleman could torture this argument into a denial of the power of the sovereign and the legislature." (P. 877.)

On June 10, 1819, the Attorney General moved the order of the day for going into committee on this bill.

Sir James Mackintosh, opposing the bill, said:

"The right honorable gentleman had observed that such a measure as the present had been introduced by the Government of the United States and acceded to by Congress. The United States, said the right honorable gentleman, concluded a treaty with Spain, and Congress passed an act to carry that treaty into effect. And why did they do so? Because, though the common law in England was sufficient for the required purpose, in America it was not. The power of making war and peace was not vested in the President of America as it was in the King of England. In America, therefore, a legislative act was necessary. But as His Majesty's proclamation of 1817 was still in force, how could any legislative measure be necessary in this country?" (P. 1094.)

Mr. Canning, supporting the bill, said:

"The house had to determine, first, if the existing laws of the country would enable her to maintain her neutrality; secondly, if the repeal of those laws would leave the power of maintaining that neutrality; and thirdly, if both the former questions were negatived, whether the proposed measure was one which it was fit to adopt." (P. 1104.)

He said further:

"Was there, he would ask, anything incompatible with the spirit of liberty in enabling a government to lay such a restraint on the action of its own subjects as might insure the observance of perfect neutrality toward two belligerents? If there was, how happened it that the honorable and learned gentleman approved so cordially of the proclamation of 1817? In that proclamation, which was the only public act of the British government on the subject, a spirit of strict impartiality had been exhibited. Contemplating the character of that proclamation, what right had any man to infer that the feelings and opinions of government had undergone a change on the subject?" (P. 1104.)

He said further:

"It surely could not be forgotten that in 1794 this country complained of various breaches of neutrality (though much inferior in degree to those now under consideration) committed on the part of subjects of the United States of America. What was the conduct of that nation in consequence? Did it resent the complaint as an infringement of its independence? Did it refuse to take such steps as would insure the immediate observance of neutrality? Neither. In 1795, immediately after the application from the British government, the legislature of the United States passed an act prohibiting, under heavy penalties, the engagement of American citizens in the armies of any belligerent power. Was that the only instance of the kind? It was but last year that the United States passed an act, by which the act of 1795 was confirmed in every respect, again prohibiting the engagement of their citizens in the service of any foreign power; and pointing distinctly to the service of Spain, or the South American provinces." (P. 1105.)

He said further:

"If a foreigner should chance to come into any of our ports and see all this mighty armament equipping for foreign service, he would naturally ask, 'With what nation are you at war?' The answer would be, 'With none.'

"'For what purpose, then,' he would say, 'are these troops levied, and by whom?' The reply of course must be, 'They are not levied by government; nor is it known for what service they are intended; but, be the service what it may, government cannot interfere.' Would not all that give such a foreigner a high idea of the excellence of the English constitution? Would it not suggest to him that for all the ordinary purposes of a state there was no government in England? Did the honorable and learned gentleman not think that the allowing of armaments to be fitted out in this country against a foreign power was a just cause of war?" (P. 1106.)

He said further:

"It was the doctrine laid down by the English government itself that was now on its trial. This country was now called upon to say whether it would act on its own asserted principles. Those acts, which the bill under the consideration of Parliament tended to repress, were acts which in the document put forth by England forty years ago were termed a 'manifest breach of the law of nations.'" (P. 1107.)

On June 11, 1819, Lord Castlereagh, in answer to an inquiry made in the debate on the bill, said: "That His Majesty's government had issued a prohibition against the exportation of arms or warlike stores to Cuba, or any of our West India islands, for the purpose of being sent to the service either of the provinces in insurrection, or of those continuing within the allegiance of Spain. They had taken precautions to guard against our own islands being made the means of thwarting the views of the parent state." (P. 1124.)

On June 21, 1819, the order of the day being for the third reading of the Foreign Enlistment bill, Sir W. Scott, supporting the bill, said:

"It was quite unnecessary for him to argue that it was just and proper to preserve a strict neutrality between a country and its colonies, when that country was bound to

us in the ties of amity, by existing treaties. When he said a strict neutrality, he meant a neutrality which consisted in a complete abstinence, not only from absolute warfare, but from the giving of any kind of assistance to either one side or the other." (P. 1232.)

He said further:

"There could be no solecism more injurious in itself, or more mischievous in its consequences, than to argue that the subjects of a state had a right to act amicably or hostilely with reference to other countries, without any interposition of the State itself. It was hardly necessary for him to press these considerations, because all the arguments that he had heard on the subject had fully admitted that it was the right of States, and of States only, to determine whether they would continue neutral or assume a belligerent attitude—that they had the power of preventing their subjects from becoming belligerent, if they pleased to exert it. In the next place, it was fully admitted that the government of this country possessed that right, which was essential to its safety and sovereignty." (P. 1233)

Mr. Robert Grant, supporting the Bill, said:

"Why, Sir, what sort of neutrality is this, which, while it operates only as a more subtle sword of annoyance against the passive party, throws an impenetrable ægis over the assailant? A neutrality which completely protects the aggressions of the power who has stipulated to observe it, while it leaves the power to whom the stipulation has been given, only tenfold more exposed and defenseless. Let the matter next be tried on a somewhat broader ground. Every government, in its foreign relations, was the representative of the nation to which it belonged, and it was of the highest importance to the peace of nations that government should be so considered. Nations announced their intentions to each other through the medium of their rulers. Hence every state knew where to look to expressions of the will of foreign nations, where to learn whether war or peace was intended, where to demand redress for injuries, and where to visit injuries unredressed. But all this system was inverted and thrown into confusion, if the government might act in one way and the nation in another. All this system was at an end if, while we were professedly at peace with Spain, she was to be attacked by a large army of military adventurers from our own shores, a sort of *extra-national* body—utterly irresponsible, utterly invulnerable, except in their own persons—for whose acts no redress could be demanded of the British government—who might burn, pillage, and destroy, then find a safe asylum in their own country and leave us to say, 'We have performed our engagements—we have honorably maintained our neutral character.'" (P. 1243.)

He said further:

"It was, besides, to be remembered, that an exact precedent for the present measure was supplied by the act to which the honorable gentleman opposite (Mr. Scarlett) had referred: the act for preventing the exportation of arms and ammunition without the royal license. There, as here, the Crown possessed a prerogative by the common law, and there, as here, you added facilities for the exercise of that prerogative by statute." (P. 1250.)

When the House divided, there appeared, ayes, 190; noes, 129.

On June 28, 1819, upon his motion to commit the bill, Earl Bathurst, supporting the bill, said:

"The supplying belligerents with warlike stores, and equipping vessels for warlike purposes, were also prohibited. With respect to this part of the bill, he had heard no objection from any quarter. The evils experienced in commerce from vessels roaming over the seas, under unknown and unacknowledged flags, had been too generally felt to suppose that British merchants would be much dissatisfied with the regulations provided by this part of the bill." (P. 1380.)

He said further:

"Looking, then, to the principles and grounds of general policy, he would say: that he should scarcely look for any other definition of a state incapable of maintaining the relations of peace and amity with other powers than this, that its subjects made war at pleasure upon states with whom their government was at peace, and without any interruption from that government to their pursuits. And yet such had been for some time the actual situation of this country." (P. 1380.)

He said further:

"What would the British merchants, who petitioned against this bill, say if they saw expeditions sailing from French ports to attack the sources of our commerce in every quarter of the world? He was afraid we should not be much benefited by its being left to the option of French officers to engage on either side, according to their individual opinions." (P. 1383.)

Lord Holland, opposing the bill, said:

"As an argument in favor of the present bill, the noble lord has said, that if it was not passed we could not preserve our neutrality. Now, he (Lord Holland) would, on the contrary, maintain, that the existing laws were sufficient for that purpose. He

would even run the hazard of standing up for the prerogative in this case against the noble lord." (P. 1391.)

He said further:

"A sovereign might be called upon by one belligerent party, with whom he was in alliance, to prevent his subjects from entering into the service of its enemy, so as to be employed against it. The sovereign might issue his proclamation prohibiting his subjects from enlisting; and if they did so after that proclamation, they would be guilty of a high misdemeanor and might be punished accordingly. But this was all that a belligerent state could ask. It could not demand from the sovereign a change in the municipal laws of his dominions, or a modification of them, to suit its convenience. The noble earl had said: 'Look to the United States, and see what they have done;' but he had not adverted to the difference between the power of the executive in this country and the American Union. The President of the United States had not the power, like the sovereign of England, of making peace and war; and, therefore, as the executive had not the right of enforcing peace, a foreign state had the right of demanding a law from the legislature to prevent war. The example of the United States was, therefore, no precedent for us, where the prerogative already possessed the right which a particular law was there requisite to confer." (P. 1391.)

The bill on this day went through the committee.

II.—LORD ALTHORP'S MOTION FOR THE REPEAL OF THE FOREIGN ENLISTMENT ACT.

Motion to repeal the Foreign Enlistment Act.

Debate in the House of Commons, on the 16th day of April, 1823. (See Hansard's Parliamentary Debates, second series, vol. viii, pp. 1019–1059.)

Mr. Canning, opposing the motion, said:

"Sir, the act is divided into two plain and distinct parts; the one prohibiting British subjects from entering into the military service of belligerent states; the other forbidding the fitting out of privateers for the service of those states, in British ports, with British means and money, or which are to be manned with British seamen." (P. 1052.)

He said further:

"If I wished for a guide in a system of neutrality, I should take that laid down by America in the days of the presidency of Washington and the secretaryship of Jefferson. In 1793 complaints were made to the American Government that French ships were allowed to fit out and arm in American ports for the purpose of attacking British vessels in direct opposition to the laws of neutrality. Immediately upon this representation the American Government held that such a fitting out was contrary to the laws of neutrality; and orders were issued prohibiting the arming of any French vessel in American ports. At New York, a French vessel fitting out was seized, delivered over to the tribunals, and condemned. Upon that occasion the American Government held that such fitting out of French ships in American ports, for the purpose of cruising against English vessels, was incompatible with the sovereignty of the United States, and tended to interrupt the peace and good understanding which subsisted between that country and Great Britain. Here, sir, I contend, is the principle of neutrality upon which we ought to act. It was upon this principle that the bill in question was enacted." (P. 1056.)

He said further:

"While we declare ourselves neutral, let us avoid passing the strict line of demarkation. When war comes, if come it must, let us enter into it with all the spirit and energy which becomes us as a great and independent state. That period, however, I do not wish to anticipate, and much less desire to hasten. If a war must come, let it come in the shape of satisfaction to be demanded for injuries—of rights to be asserted—of interests to be protected—of treaties to be fulfilled. But, in God's name, let it not come on in the paltry pettifogging way of fitting out ships in our harbors to cruise for gain. At all events, let the country disdain to be sneaked into a war. Let us abide strictly by our neutrality, as long as we mean to adhere to it; and by so doing we shall, in the event of any necessity for abandoning that system, be the better able to enter with effect upon any other course which the policy of the country may require." (P. 1057.)

When the House divided there appeared for the motion, 110; against the motion, 216.

III.—THE AFFAIR AT TERCEIRA.

Terceira.

Debate in the House of Commons on the 28th of April, 1830. (See Hansard's Parliamentary Debates, New Series, vol. xxiv. pp. 126–214.)

The resolutions before the house were as follows:

"That prior to the 12th of December, 1828, Her Majesty the Queen, Donna Maria II, had been recognized by His Majesty, and the other great powers of Europe, to be legitimate Queen of Portugal; and that at the period above named the said Queen was

residing in this country and had been received by His Majesty with the accustomed honors of her royal rank.

"That on the said 12th of December the island of Terceira, part of the dominions of the Queen of Portugal, was governed by authorities, civil and legal, in allegiance to Her Majesty.

"That on the said 12th of December instructions were given by the Lords Commissioners of the Admiralty, stating that a considerable number of Portuguese soldiers and other foreigners were about to sail in transports from Plymouth to Falmouth, and it is supposed they intend making an attack on Terceira or other of the Western Isles; and His Majesty having been pleased to command that a naval force should be immediately dispatched to interrupt any such attempt, you are hereby required and directed to take ship and sloop named in the margin under your command and to proceed with all practical expedition to Terceira; and having ascertained that you have succeeded in reaching that Island before the transports alluded to, you will remain yourself at Ongra or Praia, or cruising close to the island in the most advisable position for intercepting any vessels arriving off it, and you will detach the other ships as you shall deem best for preventing the aforesaid force from reaching any of the other islands.

"That on the arrival of the naval force sent to Terceira, in pursuance of these instructions, the commanding officer found that island in possession of, and governed by, the authorities above mentioned.

"That in the beginning of January, 1829, a number of Portuguese subjects or soldiers of her said Majesty, voluntarily left this country with a view of repairing to the said island, and that their departure and destination were known to His Majesty's Government; that they appear to have embarked and sailed in unarmed merchant-ships, to have been unaccompanied by any naval force, and themselves without any arms or ammunition of war.

"That these unarmed merchant-ships and passengers were prevented by His Majesty's naval forces, sent for the purpose, from entering the harbor of Porto Praia; and that after they had been fired into and blood had been spilled they were compelled, under threat of the further use of force, again to proceed to sea, and warned to quit the neighborhood of Terceira and the rest of the Azores, but that they might proceed wherever else they might think proper.

"That the use of force in intercepting these unarmed vessels, and preventing them anchoring and landing their passengers in the harbor of Porto Praia, was a violation of the sovereignty of the state to which the Island of Terceira belonged; and that the further interference to compel those merchant-ships or transports to quit the neighborhood of the Azores was an assumption of jurisdiction upon the high seas neither justified by the necessities of the case nor sanctioned by the general law of nations." (Pp. 126, 127).

During the debate Mr. Secretary Peel, speaking against the resolutions, said:

"The next question for consideration was the character of the expedition, and his right honorable friend contended that, going unarmed from our shores, the refugees were not to be considered as a military body, and that their conduct was no breach of our neutrality. Was it then to be contended that no expedition was a military expedition except the troops had their arms on board the same vessels with them? If they were on board one vessel, and their arms in another, did that make any difference? Was such a pretense to be tolerated by that common sense to which the Honorable Baronet had appealed," (P. 198.)

He said further:

"Arms were already provided for them at Terceira; the men were proceeding thither for the purpose of using the arms, and no person could for one moment doubt what was the real nature and character of the expedition." (P. 198.)

He said further:

"It was not necessary, he believed, further to discuss the question whether the expedition were or not a breach of our neutrality; and conceiving that it was, the next question which required to be settled was, whether or not we were justified, after the expedition had left our ports, in preventing it from reaching the place of its destination. On that point, he thought, a complete answer to the statement of his right honorable friend who opened the debate, had been given by his right honorable friend who sat near him. The Portuguese refugees and their leaders had throughout been guilty of the grossest deception toward the British Government. It had been such as to justly subject them to the treatment they had received." (P. 200.)

He said further:

"Were the Government of this country to allow itself to be deceived in the way these refugees had deceived it, the ports of England would be selected by all the discontented people of Europe to fit out and prepare expeditions against their governments; or even expeditions to plunder and devastate other countries. It might be true that we had no right to punish the Portuguese for their fraud, but we had a right to prevent them profiting by their fraud, particularly when doing what might have

involved us in a contest with another power on account of the breach of our neutrality committed by these people." (P. 200.)

He said further:

"Neutrals shall not suffer themselves or their possessions to be made instrumental in doing injury to other nations. There is no law of nature or of nations—no obligation of justice—which condemn us to be the dupes of those who would lead us into such wrong. That was the doctrine he would apply to the present case—we were not to be made the dupes of these people, to commit wrong against another power. But the consequences, he believed, of such proceedings, did we permit them, would be fatal to ourselves. If we supported or allowed fraud we should have no remedy but to submit to it when our own rights were in question. If we allowed one hostile expedition to be prepared within our territory, ten years would not elapse, to use the remarkable words of Mr. Canning in the debate on the Alien Bill, 'before this country will be made the work-shop of intrigue, and the arsenal of every malcontent faction in Europe.' Placed, as this country is, on the confines of the Old World and the New, possessing such facilities in her manufactures and in her natural advantages, and above all, in her free institutions, for the purposes of hostility, it becomes her to watch with the narrowest scrutiny that the facilities she affords are not abused to her own injury." (P. 201.)

He said further:

"He remembered that when he was sitting by the side of Mr. Canning, as his colleague in office, that it was stated by that right honorable Gentleman, shortly before the Alien Act was brought forward, and when Ministers were considering of the propriety of abandoning it altogether, that information had been obtained, and he knew it to be correct, that the Spanish constitutionalists—the martyrs to liberty, as the honorable baronet called them—had resolved to foment internal disorders in the dominions of Spain. Mr. Canning stated in the House that he did not allow a day to elapse, after learning this fact, without notifying to the persons carrying on these intrigues that 'the Government would not allow them to desecrate the asylum they had chosen for their protection,' and at the same time he gave information to the Governor of the Spanish province threatened by these machinations of what was going on. Mr. Canning said that it was ridiculous to suppose that if we authorized such a line of conduct we should not have to pay the penalties of hostility. For the interest and peace of this country—not less than for the interest and peace of other countries—he enforced on all those who resided here the strictest neutrality. 'God knew,' he said, 'when we should see the end of the prevailing agitation, when the struggle of opinions would terminate; and no man could wish for it more than he did; but he claimed these bills in order that we might not be fooled, gulled, bullied, cheated, or deceived into hostilities into which we never intended to enter.'" (P. 201.)

He said further:

"As long as England remained at peace, she might be an asylum to the unfortunate, a refuge to the distressed, and a retreat to those who were weary and heavily laden, where they might lay down their burden and be at rest. But to maintain our independence, to preserve the power of being this place of refuge, it was necessary, to use the words of Mr. Canning, that 'we should not be fooled, gulled, bullied, cheated, or deceived into hostilities;' and in order to prevent such a result, he hoped the house would join with him in rejecting the resolutions which had been proposed, and which were neither more nor less than a severe censure on the conduct of those who had prevented England from being cheated into hostilities." (P. 202.)

Mr. Huskisson, speaking in favor of the resolution, said:

"But having evaded our laws, we had no right to punish them; we might have some authority over them as long as they were within our jurisdiction, but the complaint made against them proved that they had escaped beyond the limits which the laws of nations recognized as the limits of our power." (P. 203.)

When the House divided there appeared for the motion 78; against it, 191; majority, 113. (P. 213.)

IV.—THE FOREIGN ENLISTMENT ACT OF AUGUST 9, 1870.

Foreign-enlistment act of 1870.

Debates in Parliament on the passage in the House of Commons, 1st, 3d, 4th, and 5th August, 1870. (See Hansard's Parliamentary Debates, third series, vol. cciii, pp. 1365–1381, pp. 1502–1513, pp. 1550–1556, p. 1592.)

In the House of Commons, 8th August, 1870. (See ibid., pp. 1676–1680.)

On 1st August, 1870, on the order for the second reading of the bill,

The Attorney General, Sir R. P. Collier, said:

"I think, however, the house will agree that, upon the breaking out of this unexpected and most calamitous war, Her Majesty's Government would have been very much to blame if they had delayed for a single day to introduce this measure." (P. 1367.)

He said further:

"I now come to deal with the question of the equipment and fitting out of vessels,

with respect to which there has been so much litigation. To this section of the old Act a very important addition has been suggested by the Commissioners, to the effect that it should apply not merely to the arming and equipping, but to the building of a ship. That recommendation was made by all the Commissioners, with the exception of my honorable and learned Friend the Member for Oxford, (Mr. Vernon Harcourt,) for whose authority I have the greatest respect, although I think that he, in the present instance, was wrong, and that the majority of the Commissioners were right. If such a provision were contained in the existing act, the Alabama could not have escaped and the Alexandra must have been condemned. It obviously is very unsatisfactory for a Government to be aware that a vessel is being built for a belligerent, to know her destination, to have to wait day after day till she is completed, and then one fine morning to find that she is gone. Now, that has more than once occurred, and it is desirable that it should not occur again. There is also a provision in this section which touches the case of the mere dispatches of a vessel, and a clause containing a provision to the effect that if it is shown that a vessel has been ordered to be built for a belligerent, and is supplied to that belligerent and used for warlike purposes, that shall be held to be *prima-facie* evidence that she was built for the warlike service of the belligerent, unless the innocent destination of the vessel can be established. In a provision of that kind there is, I apprehend, no hardship." (P. 1368.)

He said further:

"I have now to call attention to a very important power which we propose to give by the bill. It is the power which it confers on the Secretary of State, on his being satisfied that a vessel is being built or equipped for the service of a foreign belligerent, and is about to be dispatched, to issue his Warrant ordering her to be seized and detained, which Warrant is to be laid on the Table of the House. It is further provided that the owner of a vessel may apply to the Court of Admiralty for her release, which he may obtain if he satisfies the Court that her destination was lawful, and not only may he obtain her release but damages for her retention. In order to prevent any hardship, there is, moreover, a provision that the Admiralty shall release the vessel on a bond being given that she is not to be employed on any illegal adventure. There is another provision in respect to which the Bill, I admit, goes beyond the recommendation of the Commissioners. It gives power to the local authorities named in it to seize a vessel if they have reason to suppose she is about to escape, but then they will have to report immediately the seizure to the secretary of state, who will be empowered at once to release her should he be of opinion that there were not sufficient grounds for the seizure, and assuming the vessel to have been seized without reasonable cause, and released by the Secretary of State, the owner will be entitled to claim damages for the detention. These are the provisions by which we propose to attain the object which we have in view, and to render extremely difficult, if not almost impracticable, the escape of any such vessel as the Alexandra or the Alabama in future." (P. 1369.)

Mr. Stavely Hill, supporting the bill, said:

"It was very necessary to prevent the recurrence of what happened during the American War, when this country was made a starting point for a ship of war which, as had been aptly remarked, was an expedition in itself." (P. 1372.)

Mr. Vernon Harcourt, supporting the bill, said:

"The present law for enforcing neutrality was utterly insufficient. No one could dissent from Lord Russell's description of the case of the Alabama—that it was a scandal to the law of this country, and that the persons who were concerned in that disastrous fraud upon the laws of this country committed one of the most unpatriotic acts of which an Englishman had ever been guilty." (P. 1374.)

He said further:

"But he would venture to say, what he was sure would be confirmed by his honorable and learned Friend the Member for Richmond, (Sir Roundell Palmer,) and by the Vice-President of the Council, both of whom were members of the Commission, that the opinion of that body was that what was required was to extend and enlarge the preventive power of the law rather than to aggravate its punitive provisions. There were two objects—to prevent the offense, and to punish it when committed. The use of punishment was small save so far as it would act as a deterrent." (P. 1374.)

He said further:

"He regretted that the punitive clauses, which, in certain states of public feeling, could not be carried out, had been multiplied, and that the strength of the Bill had not been thrown into the preventive clauses." (P. 1375.)

He said further:

"The Attorney General had stated that it was his intention to strike out clause 11, which was intended to prevent the hospitality of their ports being extended to vessels that had illegally left that country, on the ground that he thought its object would be better carried out by means of a regulation to be enforced by the Executive. He (Mr. Vernon Harcourt) entirely agreed with the necessity that existed for the enforcement of some such regulation, because he believed that had the Alabama been excluded from our ports after she had escaped from this country the difficulties that had arisen

between this country and America, in reference to that vessel, would have been avoided." (P. 1378.)

Mr. Rathbone, supporting the bill, said:

"In the name of the mercantile community, he thanked the Government for introducing this Bill, which only carried out the policy which the ship-owners of Liverpool pressed on the Government of the day very soon after the escape of the Alabama." (P. 1380.)

Viscount Bury said:

"He could not agree with the honorable Member (Mr. Bourke) in regarding this as an inopportune moment for bringing forward this Bill. The fact that war was raging on the Continent was no reason for not amending our municipal law in points where this was notoriously defective. It was ridiculous to say that a builder did not know that the vessel he was building was for war purposes; and it was a less evil that the shipbuilding interest should suffer a little than that the whole nation should be involved in difficulties." (P. 1381.)

On 3d of August, 1870, upon the order for committee on the bill, the solicitor-general, Sir J. D. Coleridge, said:

"It would not occur in one case out of a thousand that the builder of a ship would have the smallest difficulty in proving what his contract was and under what circumstances it was undertaken." (P. 1510.)

He said further:

"The object of the clause was to prevent the escape of suspected ships from the harbors of the kingdom till the secretary of state had been communicated with. The clause gave an *ad interim* power of seizure." (P. 1512.)

The Attorney General, Sir R. P. Collier, said:

"The object was to give power to any officer who saw a ship about to escape to prevent such escape." (P. 1512.)

The Attorney General said further:

"The officers named would be able to seize a vessel without special instructions, in order that such vessel might not be allowed to escape. It was a most important power but it was only to be used in case of emergency, and if any wrong was done by the seizure there would be compensation." (P. 1512.)

Mr. Whalley said:

"He wished to ask, was such stringent legislation in practice in any country of the world?"

The Attorney General said:

"The clause was copied from the merchant-shipping act, which had been in force for twenty years without any complaint." (P. 1512.)

On the 4th of August, 1870, the bill being under consideration, the Attorney General, Sir R. P. Collier, said:

"He would propose to omit clause 11. This clause provided in effect that no war vessel employed in the military or naval service of any belligerent which should have been built, equipped, fitted out, armed, or dispatched contrary to this enactment should be admitted into any port of Her Majesty's dominions." (See the Report of the Commission, documents with the United States Case, vol. iv, p. 82.)

Mr. Dickinson said:

"He hoped this would not be done, otherwise vessels corresponding with the Alabama could be succored in our colonial ports."

The attorney-general said:

"He had to explain that, although the royal commissioners made a recommendation to the effect of this clause, they did not intend that it should be embodied in an act of Parliament, but that it should be carried out under the Queen's regulations. The governor of a colony would, under this clause, have to determine whether a ship entering his ports was illegally fitted out or not; and this was enough to show the object the commissioners had in view could not be carried out by an act of Parliament. It was intended, instead, to advise colonial governors of the escape of any illegally-fitted vessel."

Clause struck out. (P. 1555.)

Mr. Candlish said:

"He wished to call attention to clause 21. It provided that any custom-house officer might detain a suspected ship, so that the power would be vested in a tide-waiter who received, perhaps, 18*s.* a week. This was an extraordinary power to vest in such hands, and he would propose that the power should be only exercised by the chief officer of customs in any port of the United Kingdom." The honorable member concluded by moving his amendment. (P. 1555.)

Amendment proposed, in page 8, line 7, "to leave out the word 'any,' and insert the words 'the chief,'" (Mr Candlish) instead thereof. (P. 1556.)

Mr. Alderman Lusk said:

"He questioned the propriety of giving so much power to custom-house officers of the lower class, as was proposed by this bill to confer on them."

The attorney-general, Sir R. P. Collier, said:

"Those officers of customs were, in fact, the police of ports and harbors. No more power was conferred on them by the bill than was already exercised by every parish constable throughout the kingdom. If the power of acting under the bill were confined to the chief officer of customs, as was proposed, it might happen that in a case of emergency that officer would be absent, and serious inconvenience would be the result. The principle of the clause was in operation in the merchant-shipping act and in all the prize acts. He quite admitted that the issue was more important than any that could be raised on the merchant-shipping act, but it was because it was more important that greater restrictions should be used. The great thing was to prevent the departure from our ports of any ships of the Alabama *character*."

"Question. That the word 'any' stand part of the bill" put and *agreed* to. Amendment *negatived*. (P. 1556.)

On the 8th of August, 1870, the House of Lords, being in committee on the bill, Viscount Halifax said:

"He had refrained from entering into any explanation of the object and provisions of the bill on occasion of the second reading, on account of the small attendance which could be expected at a Saturday sitting, but he would do so very shortly. The bill repealed the existing law, re-enacting it with such improvements as experience had shown to be desirable. It prohibits subjects of Her Majesty, without license from the Crown, from taking any part in hostilities between two countries with which Her Majesty was on friendly terms. He need not adduce arguments to show how unjustifiable and monstrous it would be for British subjects to take part in hostilities, when the avowed policy of the government was that of perfect neutrality; but it was a question not of international, but of municipal law—not between this country and foreign countries, but between the Crown and the subjects of the Crown. A similar law existed in the United States, while, on the continent, governments were able to prevent their subjects from violating neutrality. The principal objects of the bill were to prohibit any subject from enlisting or inducing others to enlist in the service of a belligerent power, and from fitting out, equipping, or arming any vessel for such service. During the American war, the powers of the government in this matter were found to be insufficient. In the case of the Alabama, that vessel left this country before the order of the government, issued as soon as they had sufficient evidence before them, reached the port; she left our port as an unarmed ship, and only received her armament at sea, beyond our jurisdiction, so that no blame could attach to the government; and in the case of the Alexandra and of the rams, proceedings before legal tribunals resulted in a proof that the government had not sufficient power in the matter. They were therefore glad to buy the rams in order to avoid any difficulty. This defect would be removed by the present bill, which was based on the report of a commission presided over by the late Lord Cranworth, and composed of other distinguished men." (Pp. 1678, 1679.)

He said further:

"The measure gave power to the secretary of state to detain a suspected ship; as also to local officers at the ports, who would report to the secretary of state, so as to cast on him full responsibility. It embodied all the recommendations of the report, with the exception of that relating to the reception of vessels into British ports, and this object could be accomplished by orders in council." (P. 1679.)

Lord Redesdale "thought the late introduction of this bill was excusable, as the exigency which called for it had only just arisen." (P. 1680.)

V.—THE TREATY OF WASHINGTON.

In proposing a question in regard to the "Alabama claims," in the House of Lords, May 12, 1871—(See Hansard's Parliamentary Debates, hird series, pp 698–701)— Treaty of Washington.

Lord Redesdale said:

"The Southern States built and fitted out the Alabama. They ordered and paid for the ship. Their agents took her out of the Mersey, and equipped her in a foreign port, and the injury to the trade of the North was committed by their officers and the crews under their command." (P. 698.)

On moving an address to Her Majesty in regard to the Treaty of Washington on the 12th of June, 1871, in the House of Lords—(See Hansard's Parliamentary Debates, third series, vol. ccvi, pp. 1823–1991)—

Earl Russell said:

"These were my words, in December, 1862:

"'With regard to the claim for compensation now put forward by the United States Government, it is, I regret to say, notorious that the Queen's proclamation, of the 13th of May, 1861, enjoining neutrality in the unfortunate civil contest in North America, has in several instances been practically set at naught by parties in this country.'

"That, at all events, was a fair principle on which to proceed, and the cause came

to a point which may fairly be considered by the arbiters. Mr. Laird undertook to build a vessel for the confederate government. Mr. Adams complained that it was building, and that it was intended to be fitted out and equipped for the confederates. I replied, as I believe any secretary of state would have done, 'We must refer this to the board of customs and see whether they can obtain evidence by which the owners can be convicted.' It was referred to the legal advisers of the board, and on the 1st of July I was able to inform Mr. Adams that the board held there was not sufficient evidence that the ship was fitted out with the view of making war upon the commerce of a power on friendly terms with Her Majesty, and accordingly I deemed myself unable, on that statement, to direct a prosecution." (P. 1831.)

"On the 23d of July, Mr. Adams informed me that additional evidence had been procured that the ship was equipped so as to be fitted for warlike purposes, for he had obtained the evidence of a man named Passmore, who said it had been proposed to him by the captain of this vessel, '290,' that he should go to sea with him and make war on the commerce of the United States. That evidence was at once submitted to the law-officers of the Crown, who, on the 29th, informed me that there was a case for detaining the vessel and instituting a prosecution. On that very morning, however, she escaped, and it remains a question which may fairly be submitted to any arbitrators, whether I was justified or not, on the 24th or 25th, seizing the ship, afterward well known as the Alabama. Mr. Adams stated in one of his letters that sufficient promptitude had not been used; but Sir Roundell Palmer, speaking on the 27th of March, 1863, said:

"'The United States Government have no right to complain if the act in question (the foreign-enlistment act) is enforced in the way in which English laws are usually enforced against English subjects—on evidence and not on suspicion; on facts and not on presumption; on satisfactory testimony and not on the mere accusations of a foreign minister or his agents.' [3 Hansard, clxx, 47.] That remark, moreover, had been quoted by a noble and learned lord opposite (Lord Cairns) when the Alexandra case was argued, and Sir Roundell Palmer at once adopted it, and said he still held the same opinion. It is, therefore, a very fair question for the arbitrators, whether those five days between the 24th and 29th were lost by want of due diligence, whether the law-officers were entitled to take the time for considering the matter; and whether an order to detain the vessel should have been at once sent down." (P. 1831.)

During the same debate, Earl Granville said:

"We were in this position—that we were bound by the act; but the American Government were not bound in the least in regard to the future, and I defy any one to say there is any country which has a greater interest than we have in escaping such depredations as were committed by the Alabama. We have agreed to principles which we think are just and right; we have agreed to arbitration to settle details by arbitration, and we have agreed that our subsequent legislation shall be judged by them. According to the treaty, we are to be liable to the consequences of not using 'due diligence.' The obligation to use 'due diligence' implies that the government will do all in its power to prevent certain things, and to detain vessels which it has reasonable ground for believing are designed for warlike purposes." (P. 1850.)

"There is one proposal which was made by my noble friend (Earl Russell) so late as last year. After quoting the opinion of an individual who took a very strong part in the controversy, he said:

"'It appears to me that if the officers of the customs were misled, or blinded by the general partiality to the cause of the South, known to prevail at Liverpool, and that a *prima-facie* case of negligence could be made out'—[not an ascertained case after due inquiry and investigation]—'Great Britain might fairly grant a sum equivalent to the amount of losses sustained by the captures of the Alabama.'

"That passage occurred in the introduction of the noble earl to his published speeches." (P. 1850.)

During the same debate, the Earl of Derby said:

"The matter is one on which I hardly like to trust to the recollection of the moment, but I do not think that any one who has been concerned in these negotiations, however much he may have justified the conduct of the government of the day, denied that the escape of the Alabama was a regretable proceeding."

During the same debate Lord Cairns said:

"In the first article the duty of the neutral is qualified in this way. The neutral is 'to use all diligence to prevent the fitting out, &c., of any vessel' it has reasonable ground to believe is intended to carry on war against a belligerent. I want to know why these words 'which has reasonable ground to believe' are not repeated in the second rule. Why is the phraseology so entirely different in the first and second parts of the clause? The only explanation hitherto given us is that given by the president of the council, who says that the charge against us is that we did not use that due diligence which was incumbent upon us as neutrals. But the words 'due diligence' occur in the first part of the clause just as much as they do in the second; and if due diligence is enough, and would prevent the question arising as to whether you had rea-

sonable ground for believing, why should they not be sufficient in the first part as well as in the second? But the question would be one of the first to arise under the second part of the clause. When you urge that you had no reasonable ground for believing that a vessel leaving your ports was intended to cruise or carry on war against a power with which you were at peace, it may be said that you ought to have known it and would have known it if you had used due diligence. Therefore, I think it most important that, through what I may call an oversight on the part of those who constructed this clause, those qualifying words which were our only protection were omitted from the second part." (P. 1887.)

He said further:

"Any one of your lordships who considers the sentence will see that the point turns upon the words 'due diligence;' a neutral is bound to use 'due diligence.' Now, the moment you introduce those words, you give rise to another question, for which I do not find any solution in this rule. What is the standard by which you can measure due diligence? Due diligence by itself means nothing. What is due diligence with one man, with one power, is not due diligence with another man, with a greater power. Now this becomes much more important when you introduce in connection another consideration. The rule I have read is to be a rule of international law, and if there is one thing more clear than another in international laws, it is this, that as between two countries, it is no excuse where an international obligation has been broken for one country to say to another that its municipal law did not confer upon its Executive sufficient power to enable it to fulfill its international duty." (P. 1888.)

During the same debate, the Lord Chancellor, Lord Hatherley, said:

"In the first place, it was well said that there is no correlative connection between international and municipal law in the abstract; that a foreign nation has nothing to do with the municipal law of another nation, but has a right to meet a statement that in any country with which it has dealings there exists no such law as would prevent the acts complained of, with the reply that it ought to have such a law, and that international law alone must settle the question between them—this being the line taken by the United States in reference to the Alabama." (P. 1890.)

The Marquis of Salisbury said:

"We have not been told what is to be the standard of 'due diligence' for us. A neutral will now be bound to adopt a system of espionage in order to ascertain whether any vessel is intended for a hostile cruise. It will be bound to increase its police, that it may have full information of all such undertakings. It will be bound to interfere with its subjects, to make minute inquisitions, to take an enormous number of costly and laborious precautions which before this treaty it was not bound to take."

On the 29th of June, 1871, in the House of Lords, in reference to a motion for an Address to Her Majesty in regard to the Treaty of Washington, (see Hansard's Parliamentary Debates, third series, vol. ccvii, pp. 729–741,) Earl Granville said:

"On the one hand, nothing is so easy as to prevent a vessel of the Alabama class escaping from our shores; and the only loss to the country which would result from such a prevention would be the small amount of profit which the individual constructing and equipping the vessel might derive from the transaction, which in almost every case is contrary to the proclamation of the Queen." (P. 741.)

NOTE C.—MEMORANDUM OF CORRESPONDENCE AND DOCUMENTS RELATIVE TO THE AMENDMENT OF THE ENGLISH FOREIGN-ENLISTMENT ACT, 1861'-71.

On the 7th of September, 1861, Mr. Seward, writing to Mr. Adams, said:

"I do not think it can be regarded as disrespectful if you should remind Lord Russell that when, in 1838, a civil war broke out in Canada, a part of the British dominions adjacent to the United States, the Congress of the United States passed, and the President executed, a law which effectually prevented any intervention against the Government of Great Britain in those internal differences by American citizens, whatever might be their motives, real or pretended, whether of interest or sympathy. I send you a copy of that enactment. The British Government will judge for itself whether it is suggestive of any measures on the part of Great Britain that might tend to preserve the peace of the two countries, and, through that way, the peace of all nations." (Am. App., vol. i, p. 102, 660.)

On the 28th of November, 1861, and, as it appears, before Mr. Adams had taken the direct action indicated in the dispatch of Mr. Seward above quoted, Lord Russell wrote to him as follows:

"Having thus answered Mr. Adams upon the two points to which his attention was called, the undersigned has only further to say that if, in order to maintain inviolate the neutral character which Her Majesty has assumed, Her Majesty's Government should find it necessary to adopt further measures, within the limits of public law, Her Majesty will be advised to adopt such measures." (Am. App., vol. i, p. 661.)

On the 27th of March, 1862, Lord Russell wrote to Mr. Adams in part as follows:

"I agree with you in the statement that the duty of nations in amity with each other is not to suffer their good faith to be violated by evil-disposed persons within their borders merely from the inefficacy of their prohibitory policy." (Am. App., vol. ii, p. 602.)

On the 20th of November, 1862, Mr. Adams, in accordance with explicit instructions from Mr. Seward, wrote to Lord Russell, submitting to his consideration a large number of papers, establishing the fact that the Alabama had destroyed a number of United States vessels, and so was actually carrying out the intention which Mr. Adams alleged that she had prior to her departure from the ports of Great Britain, and in the conclusion of the letter Mr. Adams said:

"Armed by the authority of such a precedent, having done all in my power to apprise Her Majesty's Government of the illegal enterprise in ample season for effecting its prevention, and being now enabled to show the injurious consequences to innocent parties, relying upon the security of their commerce from any danger through British sources ensuing from the omission of Her Majesty's Government, however little designed, to apply the proper prevention in due season, I have the honor to inform your lordship of the directions which I have received from my Government to solicit redress for the national and private injuries already thus sustained, as well as a more effective prevention of any repetition of such lawless and injurious proceedings in Her Majesty's ports hereafter." (Am. App., vol. iii, p. 72; vol. i, p. 666. Brit. App., vol. iv, p. 15.)

On the 19th of December, 1862, Lord Russell in part replied to Mr. Adams as follows:

"As regards your demand for a more effective prevention for the future of the fitting out of such vessels in British ports, I have the honor to inform you that Her Majesty's Government, after consultation with the Law-Officers of the Crown, are of opinion that certain amendments might be introduced into the Foreign-Enlistment Act, which, if sanctioned by Parliament, would have the effect of giving greater power to the Executive to prevent the construction in British ports of ships destined for the use of belligerents. But Her Majesty's Government consider that, before submitting any proposals of that sort to Parliament, it would be desirable that they should previously communicate with the Government of the United States, and ascertain whether that Government is willing to make similar alterations in its own Foreign-Enlistment Act; and that the amendments, like the original statute, should, as it were, proceed *pari passu* in both countries.

"I shall accordingly be ready at any time to confer with you, and to listen to any suggestions which you may have to make by which the British Foreign-Enlistment Act, and the corresponding statute of the United States, may be made more efficient for their purpose." (Am. App., vol. i, p. 667; vol. iii, p. 888; Brit. App., vol. iv, p. 25.)

On the 25th of December, 1862, this reply of Lord Russell was forwarded by Mr. Adams to Mr. Seward, (Am. App., vol. iii, p. 87,) and on the 19th of January, 1863, Mr. Seward wrote to Mr. Adams, replying to the suggestions of Lord Russell, in part as follows:

"It is not perceived that our anti-enlistment act is defective, or that Great Britain has ground to complain that it has not been effectually executed. Nevertheless, the proposition of Her Majesty's Government that the two Governments shall confer together upon amendments to the corresponding acts in the two countries evinces a conciliatory, a liberal, and just spirit, if not a desire to prevent future causes of complaint. You are, therefore, authorized to confer with Earl Russell, and to transmit for the consideration of the President such amendments as Earl Russell may in such a conference suggest, and you may think proper to be approved.

"You will receive herewith a copy of some treasonable correspondence of the insurgents at Richmond with their agents abroad, which throws a flood of light upon the naval preparations they are making in Great Britain. You will use these papers in such a manner as shall be best calculated to induce the British Government to enforce its existing laws, and, if possible, to amend them so as to prevent the execution of the unlawful designs which will thus be brought to their notice in a manner which will admit of no question in regard to the sufficiency of evidence." (Am. App., vol. iii, p. 113; vol. i, pp. 546, 667.)

On the 9th of February, 1863, Mr. Adams wrote to Lord Russell, transmitting the "treasonable correspondence of the insurgents at Richmond with their agents abroad," and said in part as follows:

"These papers go to show a deliberate attempt to establish within the limits of this kingdom a system of action in direct hostility to the Government of the United States. This plan embraces not only the building and fitting out of several ships of war under the direction of agents especially commissioned for the purpose, but the preparation of a series of measures under the same auspices for the obtaining from Her Majesty's subjects the pecuniary means essential to the execution of those hostile projects." (Am. App., vol. i, p. 562.)

On the 13th of February, 1863, Mr. Adams having had a personal interview with Earl Russell, wrote to Mr. Seward as follows:

"In obedience to your instructions contained in dispatch No. 454, I called the attention of Lord Russell, in my conference of Saturday, to the reply made by him to my note of the 20th of November last, claiming reparation for the damage done by No. 290, and security against any repetition of the same in future. I observed that my Government had not yet authorized me to say anything in regard to the answer on the first point; but with respect to the second, his lordship's suggestion of possible amendments to the enlistment laws in order to make them more effective had been received. Although the law of the United States was considered as of very sufficient vigor, the Government were not unwilling to consider propositions to improve upon it.

"To that end I had been directed to ask whether any such had yet been matured by Her Majesty's Ministers; if so, I should be happy to receive and to transmit them to Washington. His lordship, repeating my remark that my Government considered its present enlistment law as efficiently effective, then added that since his note was written the subject had been considered in the cabinet, and the Lord Chancellor had expressed the same opinion of the British law. Under these circumstances he did not see that he could have any change to propose.

"I replied that I should report this answer to my Government. What explanation the Government was ready to give for its utter failure to execute a law confessed to be effective did not then appear." (Am. App., vol. i, p. 668.)

On the 14th of February, 1863, Lord Russell reported this same interview, as follows, in a dispatch to Lord Lyons:

"I had a conversation a few days ago with Mr. Adams on the subject of the Alabama.

"It did not appear that this Government desired to carry on the controversy on this subject from Washington; they rather left the conduct of the argument to Mr. Adams.

"On a second point, however, namely, whether the law with respect to equipment of vessels for hostile purposes might be improved, Mr. Adams said that his Government was ready to listen to any propositions Her Majesty's Government had to make, but they did not see how their own law on this subject could be improved.

"I said that the cabinet had come to a similar conclusion; so that no further proceedings need be taken at present on this subject." (Am. App., vol. i, p. 668. Brit App., vol. i, pt. i, p. 48.)

On the 2d of March, 1863, on receipt of Mr. Adams's dispatch of the 13th of February, Mr. Seward wrote to Mr. Adams in part as follows:

"It remains for this Government, therefore, only to say that it will be your duty to urge upon Her Majesty's Government the desire and expectation of the President that henceforward Her Majesty's Government will take the necessary measures to enforce the execution of the law as faithfully as this Government has executed the corresponding statutes of the United States." (Am. App., vol. i, p. 669.)

On the 27th of March, 1863, Lord Russell, reporting to Lord Lyons a conversation which Mr. Adams had had with him the day before, and after the receipt of the dispatch last quoted, wrote in part as follows:

"Mr. Adams said there was one thing which might be easily done. It was supposed the British Government were indifferent to these notorious violations of their own laws. Let them declare their condemnation of all such infractions of law.

"With respect to the [enlistment] law itself, Mr. Adams said either it was sufficient for the purposes of neutrality, and then let the British Government enforce it; or it was insufficient, and then let the British Government apply to Parliament to amend it.

"I said that the cabinet were of opinion that the law was sufficient, but that legal evidence could not always be procured; that the British Government had done everything in its power to execute the law; but I admitted that the cases of the Alabama and Oreto were a scandal, and, in some degree, a reproach to our laws." (Am. App., vol. i, p. 670; vol. iii, p. 122. Brit. App., vol. iv, pt. ii, p. 2.)

On the 27th of March, 1863, the neutrality laws of Great Britain being under consideration, in connection with the escape of the Alabama, the Solicitor-General, Sir Roundell Palmer, said:

"The United States Government appear to have a more convenient method than ours. Their customs authorities have a court always sitting, ready to deal with such matters; but in this country the customs authorities would have had to seize the ship, without any order of the court, on the responsibility of the Government; and it would be a direct violation of the law to do that, unless there was a justifying cause for doing so." (Am. App., vol. iv, p. 522.)

In the same debate, he said further:

"And if our law is defective, it is for this House to consider whether it ought to be amended. If Her Majesty's Government thought it was so, they would be willing, in concert with the American Government, to consider how it might be amended. But they could not think it would be acting prudently or safely to come down to Parliament and propose an alteration in our law, unless they had reason to believe that the American Government were prepared to take some steps to place their law also on the same basis." (Am. App., vol. iv, p. 523.)

In the same debate, Lord Palmerston said:

"But if this cry is raised for the purpose of driving Her Majesty's Government to do something which may be contrary to the laws of the country, or which may be derogatory to the dignity of the country, in the way of altering our laws for the purpose of pleasing another Government, then all I can say is, that such a course is not likely to accomplish its purpose.

* * * * * * * *

"I think that the House at least will see that the statement of my honorable and learned friend proves that we have, in regard to enforcing the Foreign-Enlistment Act, done all that the law enabled or permitted us to do.

* * * * * * * *

"The law is in this case of very difficult execution. This is not the first time when that has been discovered. When the contest was raging in Spain between Don Carlos and Queen Isabella, it was my duty, the British Government having taken part with the Queen, to prevent supplies from being sent to Don Carlos from this country. There were several cases of ships fitted out in the Thames; but, though I knew they were intended to go in aid of Don Carlos, it was impossible to obtain that information which would have enabled the Government to interfere with success.

* * * * * * * *

"I do hope and trust that the people and Government of the United States will believe that we are doing our best in every case to execute the law; but they must not imagine that any cry which may be raised will induce us to come down to this House with a proposal to alter the law. We have had—I have had—some experience of what any attempt of that sort may be expected to lead to; and I think there are several gentlemen sitting on this bench who would not be disposed, if I were so inclined myself, to concur in any such proposition." (Am. App., vol. v, pp. 530, 531.)

On the 9th of June, 1863, certain merchants of Liverpool addressed a memorial to Lord Russell, in part as follows:

"Your memorialists, who are deeply interested in British shipping, view with dismay the probable future consequences of a state of affairs which permits a foreign belligerent to construct in, and send to sea from, British ports vessels of war in contravention of the provisions of the existing law.

"That the immediate effect of placing at the disposal of that foreign belligerent a very small number of steam cruisers has been to paralyze the merchant marine of a powerful maritime and naval nation, inflicting within a few months losses, direct and indirect, on its ship-owning and mercantile interests which years of peace may prove inadequate to retrieve.

* * * * * * * *

"Your memorialists would accordingly respectfully urge upon your lordship the expediency of proposing to Parliament to sanction the introduction of such amendments into the Foreign-Enlistment Act as may have the effect of giving greater power to the Executive to prevent the construction in British ports of ships destined for use of belligerents." (Am. App., vol. i, p. 672.)

On the 24th of June, 1863, the Lord Chief Baron, in charging the jury in the Alexandra case, said:

"Gentlemen, I must say, it seems to me that the Alabama sailed away from Liverpool without any arms at all, merely a ship in ballast, unfurnished, unequipped, unprepared, and her arms were put in at Terceira, not a port in Her Majesty's dominions. The Foreign-Enlistment Act is no more violated by that than by any other indifferent matter that might happen about a boat of any kind whatever." (Am. App., vol. v, p. 129.)

On the 6th of July, 1863, Mr. Hammond, by the direction of Earl Russell, replied to the memorial of the Liverpool merchants, in part as follows:

"In Lord Russell's opinion the Foreign-Enlistment Act is effectual for all reasonable purposes, and to the full extent to which international law or comity can require, provided proof can be obtained of any act done with the intent to violate it.

"Even if the provisions of the act were extended, it would still be necessary that such proof should be obtained, because no law could or should be passed to punish upon suspicion instead of upon proof." (Am. App., vol. i, p. 673.)

On the 16th of July, 1863, Mr. Adams, transmitting to Mr. Seward copies of the memorial of the Liverpool merchants, and of the reply to the same, wrote in part as follows:

"It may be inferred from this that the Government will persist in their efforts to enforce the provisions of the Enlistment Act through the Courts, reserving to themselves an avenue of escape, by reason of any failure to be supplied with evidence of intent to violate them. Whether they expect the duty of looking this up to be performed by us, or they design to seek it also from other sources, does not clearly appear." (Am. App., vol. i, p. 671.)

On the 16th of September, 1863, Mr. Adams, in a letter to Earl Russell, while describing the great danger threatening the United States in the building of the rams by the Lairds at Liverpool, said in part as follows:

"And here your lordships will permit me to remind you that Her Majesty's Government cannot justly plead the inefficacy of the provisions of the enlistment law to enforce the duties of neutrality in the present emergency as depriving them of the power to prevent the anticipated danger. It will doubtless be remembered that the proposition made by you, and which I had the honor of being the medium of conveying to my Government, to agree upon some forms of amendment of the respective statutes of the two countries, in order to make them more effective, was entertained by the latter, not from any want of confidence in the ability to enforce the existing statute, but from a desire to co-operate with what then appeared to be the wish of Her Majesty's Ministers. But, upon my communicating this reply to your lordship, and inviting the discussion of propositions, you then informed me that it had been decided not to proceed any further in this direction, as it was the opinion of the Cabinet, sustained by the authority of the Lord Chancellor, that the law was fully effective in its present shape." (Am. App., vol. ii, p. 378; vol. vi, p. 673. Brit. App., vol. ii, p. 364.)

On the 25th of September, 1863, Earl Russell replied to Mr. Adams in part as follows:

"There are, however, passages in your letter of the 16th, as well as in some of your former ones, which so plainly and repeatedly imply an intimation of hostile proceeding toward Great Britain on the part of the Government of the United States, unless steps are taken by Her Majesty's Government which the law does not authorize, or unless the law, which you consider as insufficient, is altered, that I deem it incumbent upon me, in behalf of Her Majesty's Government, frankly to state to you that Her Majesty's Government will not be induced by any such consideration either to overstep the limits of the law, or to propose to Parliament any new law which they may not, for reasons of their own, think proper to be adopted. They will not shrink from any consequences of such a decision." (Am. App., vol. i, p. 674; vol. ii, p. 384. Brit. App., vol. ii, p. 374.)

On the 16th of February, 1864, Earl Russell spoke in the House of Lords in part as follows:

"Referring again to the Alabama, the noble earl seems to be much shocked because I said that that case was a scandal, and in some sense a reproach upon British law. I say that here, as I said in that dispatch. I do consider that, having passed a law to prevent the enlistment of Her Majesty's subjects in the service of a foreign power, to prevent the fitting out or equipping, within Her Majesty's dominions, of vessels for warlike purposes without Her Majesty's sanction; I say that, having passed such a law in the year 1819, it is a scandal and a reproach that one of the belligerents in this American contest has been enabled, at the order of the confederate government, to fit out a vessel at Liverpool in such a way that she was capable of being made a vessel of

war; that, after going to another port in Her Majesty's dominions to ship a portion of her crew, she proceeded to a port in neutral territory and there completed her crew and equipment as a vessel of war, so that she has since been able to capture and destroy innocent merchant vessels belonging to the other belligerent. Having been thus equipped by an evasion of the law, I say it is a scandal to our law that we should not be able to prevent such belligerent operations. I venture to say so much, because at the Foreign Office I feel this to be very inconvenient. If you choose to say, as you might have said in former times, 'Let vessels be fitted out and sold; let a vessel go to Charleston, and there be sold to any agent of the confederate government,' I could understand such a state of things. But if we have a law to prevent the fitting out of warlike vessels, without the license of Her Majesty, I do say this case of the Alabama is a scandal and a reproach. A very learned judge has said that we might drive, not a coach and six, but a whole fleet of ships through that act of Parliament. If that be a correct description of our law, then I say we ought to have the law made more clear and intelligible. This law was said to be passed to secure the peace and welfare of this nation, and I trust it may be found in the end sufficient for that purpose. I say, however, that while the law remains in its present state its purpose is obviously defeated, and its enactments made of no effect by British subjects who defy the Queen's proclamation of neutrality." (Am. App., vol. v, p. 528.)

On the 30th of August, 1865, the British Foreign-Enlistment Act remaining unchanged, and the rebellion in the United States having been crushed, Earl Russell wrote Mr. Adams in part as follows:

"You say, indeed, that the Government of the United States altered the law at the urgent request of the Portuguese minister. But you forget that the law thus altered was the law of 1794, and that the law of 1818, then adopted, was, in fact, so far as it was considered applicable to the circumstances and institutions of this country, the model of our Foreign-Enlistment Act of 1819.

"Surely, then, it is not enough to say that your Government, at the request of Portugal, induced Congress to provide a new and more stringent law for the purpose of preventing depredations, if Great Britain has already such a law. Had the law of the United States of 1818 not been already, in its main provisions, adopted by our legislature, you might reasonably have asked us to make a new law; but, surely, we are not bound to go on making new laws *ad infinitum* because new occasions arise.

"The fact is, this question of a new law was frequently discussed; but the conclusion arrived at was, that unless the existing law, after a sufficient trial, should be proved to be practically inadequate, the object in view would not be promoted by any attempt at new legislation." (Am. App., vol. i, p. 677; vol. iii, p. 562,)

On the 18th of September, 1865, Mr. Adams replied to Earl Russell in part as follows:

"The British law is, as your lordship states, a re-enactment of that of the United States, but it does not adopt all of 'its main provisions,' as you seem to suppose. Singularly enough, it entirely omits those very same sections which were originally enacted in 1817, as a temporary law on the complaint of the Portuguese minister, and were made permanent in that of 1818. It is in these very sections that our experience has shown us to reside the best preventive force in the whole law. I do not doubt, as I had the honor to remark in my former note, that if they had been also incorporated in the British statute, a large portion of the undertakings of which my Government so justly complains would have never been commenced; or, if commenced, would never have been executed. Surely it was not from any fault of the United States that these effective provisions of their own law failed to find a place in the corresponding legislation of Great Britain. But the occasion having arisen when the absence of some similar security was felt by my Government to be productive of the most injurious effects, I cannot but think that it was not so unreasonable, as your lordship seems to assume, that I should hope to see a willingness in that of Great Britain to make the reciprocal legislation still more complete. In that hope I was destined to be utterly disappointed. Her Majesty's government decided not to act. Of that decision it is no part of my duty to complain. The responsibility for the injuries done to citizens of the United States by the subjects of a friendly nation, by reason of this refusal to respond, surely cannot be made to rest with them. It appears, therefore, necessarily to attach to the party making the refusal." (Am. App., vol. i, pp. 679, 680.)

On the 2d of November, 1865, Earl Russell wrote to Mr. Adams in part as follows:

"Yet it appears to me, I confess, that as neither the law of the United States nor our own Foreign-Enlistment Act have proved upon trial completely efficacious, it is worth consideration whether improvements may not be made in the statutes of both nations, so that for the future each government may have in its own territory as much security as our free institutions will permit against those who act in defiance of the intention of the sovereign, and evade the letter of its laws." (Am. App., vol. iii, p. 588.)

On the 18th of November, 1865, Mr. Adams replied to the Earl of Clarendon, successor of Earl Russell, in part as follows:

"Yet with regard to the proposition immediately before me, I cannot forbear to observe that it is predicated upon an assumption that the legislation of the two countries

is now equally inefficacious, which I cannot entertain for a moment. On the contrary, the necessity for some action in future seems to me to be imperative, because that legislation, as it now stands, is not co-extensive.

"For it is hardly possible for me to imagine that the people of the United States, after the experience they have had of injuries from the imperfection of British legislation, and a refusal to amend it, would be ready cheerfully to respond to another appeal like that made in 1855, by Her Majesty's representative, to the more stringent and effective protection extended by their own." (Am. App., vol. iii, p. 621.)

On the 14th of December, this last dispatch having been transmitted to Mr. Seward, he wrote Mr. Adams in part as follows:

"I am directed by the President to approve of the views which you have expressed in regard to a proposition made by Earl Russell for a concurrent revision by the two Governments of their legislation upon the subject of the neutrality laws. You will, therefore, inform Lord Clarendon that the United States do not incline toward an acceptance of Earl Russell's proposition." (Am. App., vol. iii, p. 625.)

On the 30th of January, 1867, a Commission was appointed by the Queen—

"To inquire into and consider the character, working, and effect of the laws of this realm, available for the enforcement of neutrality during the existence of hostilities between other states with whom we are at peace; and to inquire and report whether any and what changes ought to be made in such laws for the purpose of giving to them increased efficiency, and bringing them into full conformity with our international obligations." (Am. App., vol. iv, p. 79.)

During the year 1868, the Commission reported that in their opinion the Foreign-Enlistment Act "might be made more efficient by the enactment of" certain provisions. See the report. (Am. App., vol. iv, p. 80.)

The British Foreign-Enlistment Act of August 9, 1870, which was passed just after the breaking out of the Franco-Prussian War, essentially embodies all the recommendations of the Commission. (See the Act, Am. App., vol. vii, pp. 1–9. See also extracts from the debates at the time of its passage, *ante*.)

NOTE D.—CONSIDERATION OF THE CLAIMS ARISING IN THE DESTRUCTION OF VESSELS AND PROPERTY BY THE SEVERAL CRUISERS.

Detailed statements have been presented.

The United States presented to this Tribunal, on the 15th of December last, a detailed printed statement of all the claims for the destruction of vessels and property by the several cruisers that had, down to that date, come to their knowledge in time to be so presented. The United States then declared that this statement showed the cruisers which did the injury, the vessels destroyed, the several claimants for the vessel and for the cargo, the amount insured upon each, and all the other facts necessary to enable this Tribunal to reach a conclusion as to the amount of the injury committed by the cruiser; and further, that it showed the nature and character of the proof placed in the hands of the United States by the sufferers.

In accordance with its right, the United States again, on the 15th day of April last, presented to this Tribunal a revised statement of claims containing those mentioned in the previous statement, as well as others which had been received by the Government of the United States subsequent to the printing of the previous statement and prior to the 22d of March, 1872, at which time it was necessary to conclude the printing of the revised list in order that it might reach Geneva in season for presentation with the Counter Case of the United States. (See Revised List of Claims, p. 335.)

With the evidence furnished by the claimants to support them.

These claims do not appear as claims audited by the United States, but in the form and supported by the evidence in which the claimants have presented them to the Government of the United States.

In his Annual Message in December, 1870, President Grant recommended that Congress should authorize the appointment of a Commission to take proof of the amounts and the ownership of these several claims on notice to the representative of Her Majesty at Washington; and also that authority should be given for the settlement of these claims by the United States, so that the Government might have the ownership of the private claims as well as the responsible control of all demands against Great Britain. A Bill had been introduced into Congress for carrying out this recommendation of the President, when the negotiation and ratification of the Treaty under which this Tribunal is now assembled, prevented the proposed legislation. Otherwise these claims might now have existed as so many millions of dollars which the United States had paid to its citizens for injuries which it believed to have been inflicted upon them by Great Britain.

Recognizing the situation in which these and other claims of the United States existed, the Treaty provided that under certain conditions this Tribunal might "proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it;" and further, that in case the Tribunal "should not award a sum in gross," then that "a board of assessors" should be appointed to ascertain and determine what claims are valid, and what amount or amounts should be paid by Great Britain to the United States on account thereof, under the decision of this Tribunal.

The United States desire an award of a sum in gross on the evidence presented.

The United States, however, for reasons stated in its Case, (p. 480,) earnestly expressed the hope that the Tribunal would exercise the power conferred upon it to award a sum in gross to be paid by Great Britain to the United States, believing that it would be unjust to impose further delay and the expense of presenting claims to another tribunal, if the evidence which the United States has the honor to present for the consideration of these Arbitrators shall prove to be sufficient to enable them to determine what sum in gross would be a just compensation to the United States for all the injuries and losses of which it complains. In the opinion of the United States, the evidence presented does furnish all the facts necessary to enable the Tribunal to reach such a conclusion. The United States has not, however, thought it necessary to print all the memorials and documents presented by the several claimants, and referred to in the two lists of claims; nor, in the absence of any expressed desire on the part of this Tribunal, has it produced, as it offered to do, if desired, the original evidence.

British criticisms on this evidence.

Her Majesty's Government has, in vol. vii of the Appendix, presented with the Counter Case a report of a committee of two persons, Messrs. Cohen and Young, appointed by the Board of Trade to investigate the claims presented on behalf of the United States Government.

This committee felt it to be its duty to sift and analyze these claims, to state the amounts which, in its opinion, should be considered to constitute a fair and proper

compensation for the losses in respect to which these claims are put forward, and to explain the reasons upon which its conclusions were founded.

Their report is said to cover all the claims contained in the printed list, exclusive of the claims for interest and the claims relating to increased war premiums. And in the British Counter Case (p. 134) it is stated that "a reference to this report will convince the Arbitrators that no reliance can be placed on the estimates presented of alleged private losses, and that were the Tribunal to hold Great Britain liable in respect to any one or more of the enumerated cruisers, and to decide on awarding a gross sum for compensation, these estimates could not safely be accepted as furnishing even a *prima-facie* basis for the computation of such a gross sum."

The Government of the United States, on the other hand, holds that the statement of claims presents all the facts necessary to enable the Tribunal to reach a conclusion as to the amount of injury committed by each cruiser, not with that exactness which would be necessary if the Tribunal were asked to assess the damages caused to each claimant, but with sufficient exactness to enable the Tribunal "to award a sum in gross to be paid by Great Britain to the United States for all the claims."

The answer to these criticisms

The United States cannot recognize the report of Messrs. Cohen and Young as any basis for the estimate or computation of indemnity by this Tribunal. To that committee as a Board of Assessors the United States have not referred these claims, neither has this Tribunal sought the report of those gentlemen as the opinion of experts.

The Counsel of the United States will, however, call the attention of this Tribunal to some of the general characteristics of these claims as they appear in the lists of claims, and at the same time will note certain comments made thereon by Messrs. Cohen and Young.

The claims now under discussion (excluding those for increased war premiums) may be divided into two general classes:

1. Claims for the alleged value of property destroyed by the several cruisers.
2. Claims arising from damages in the destruction of property, but over and above its value.

Under the first class would be included, (*a*) owners' claims for the values of goods destroyed; (*b*) merchants' claims for the values of goods destroyed; (*c*) whalers and fishermen's claims for the values of oil or fish destroyed; (*d*) passengers, officers, and sailors' claims for the values of personal property destroyed; (*e*) the claims of insurance companies, for the values of property destroyed for which they had paid the owners the insurance.

Under the second class of claims would be included, (*a*) owners' claims for the loss of charter-parties, freights, &c.; (*b*) merchants' claims for the loss of expected profits on goods; (*c*) whalers and fishermen's claims for the prospective catch of oil or fish; (*d*) passengers' claims for various injuries other than in the loss of baggage; (*e*) officers' and sailors' claims for wages and expenses until their arrival home.

As to this first general class of claims, the Counsel believe that the Tribunal will find that they are fairly stated by the claimants. It was possible, doubtless, for Messrs. Cohen and Young to find therein some claims which seemed to them to have been exaggerated; but certainly as to the value of property this Tribunal must regard the sworn valuation of men who owned the property destroyed, and who made their estimates at or about the time of its destruction, rather than the estimates of Messrs. Cohen and Young, who have no knowledge of the property destroyed, except that the claimants say it was of a certain value.

The owners of vessels have generally sought to establish their claims by a sworn memorial setting forth the facts, describing the vessel, and stating her value. In some instances they have presented the certificate of underwriters or ship-builders in support of their statement. An examination of their several claims will show that the owners have by no means given such values to their vessels as would show them to have been of an equal value per ton. But this is no evidence of exaggerated value, as Messrs. Cohen and Young would seem to imply, but, rather, being correspondent with the fact, namely, that the vessels are not of equal value per ton, indicates that the owners have placed a fair valuation upon their property.

Messrs. Cohen and Young have made some investigations from which they have concluded that the price of $40 per ton is a liberal estimate of the average market price of the merchant vessels destroyed by the Alabama and other cruisers, and it may be well to notice how they arrived at this conclusion; for it will then appear how little value can be put upon the same. They say, vol. vii, Appendix, British Case, p. 22, "We have been at some pains to ascertain the average price per ton which was realized, shortly before the time of the captures, in the ports of Liverpool and London by a sale of a very large number of vessels belonging to the United States, and it seems to us to be a fair inference from the fact of these sales being effected in England, that the prices obtained here did not fall short of the market value in America."

Injustice of the British estimate of the value of the vessels destroyed.

The Counsel maintain that no average price or no conclusion could be more unjust

Prices obtained under forced sales no criterion.

than this. The fact being that British-built cruisers were destroying every United States vessel they could find, led some United States citizens to sell their ships to Englishmen, who could fly over them a flag that would save them from this destruction. Under these circumstances, it has probably been possible for Messrs. Cohen and Young to find at Liverpool and London the record of the terms of transfer of many ships of the United States to British subjects. But if this Tribunal shall find that Great Britain has, by any act or omission, failed to fulfill any of the duties set forth in the three rules, or recognized by the principles of international law, not inconsistent with such rules, and shall certify such fact as to the Alabama and each of the other cruisers, certainly it will not then proceed to award that Great Britain shall pay for those vessels which the Alabama destroyed at the low rate at which Englishmen were enabled to buy other vessels of the United States, which were sacrificed rather than to run the risk of their capture by the same cruisers. And further, the value to a citizen of the United States of a ship in London, under the British flag, is not the same as her value to him under the flag of the United States.

By the laws of the United States, certain privileges are given to vessels built in the United States and owned by citizens of the United States, and practically no vessel can carry the flag of the United States unless it was built in the United States. The object of this law is to encourage ship-building in the United States, and the effect of it is to make ships built in the United States more valuable to citizens of the United States than similar ships built out of the United States would be to citizens of the United States, or than the same ships would be to any persons not citizens of the United States. Therefore, the price at which a United States ship can be sold in Great Britain is by no means the representative of her value to a citizen of the United States, for the United States citizen, while he owns her, is able to employ her in certain trade and commerce in which the British subject cannot employ her. Consequently, but few United States vessels have ever been sold in England, except when the Alabama and her consorts were burning all vessels that carried the flag of the United States. Certainly those United States citizens who lost their vessels by the Alabama must not be paid for them at the rate at which other citizens of the United States sacrificed their property through fear of the same danger. The fact that a large number of vessels were transferred to the British flag, though it has destroyed the commerce of the United States, may have saved Great Britain from the liability of paying for the absolute destruction of the vessels transferred. But it cannot, in justice, be held to present a standard of value for others, not sacrificed through fear of burning, but actually burned.

The owners have estimated the round value of their property as vessels of the United States to citizens of the United States, and at that rate it must be estimated in the award of any gross sum.

Whaling and fishing vessels.

What has been said in regard to the estimate put upon the merchant vessels by Messrs. Cohen and Young will also apply to their estimate put upon the whaling and fishing vessels. They say, page 18:

"The inquiries that we have instituted convince us that an average rate of $100 per ton will amply represent the value of the whalers," and the context shows that this estimate includes the outfit also.

From page 17 of their report it appears that the average rate of the claims for outfits, (32 in number,) which are made distinctly and separately from the claims for the value of the vessel, is at the rate of $88 per ton.

The Counsel ask the Tribunal to assume that these claims for outfits are strictly correct. The owners of each vessel keep a separate and accurate account of all the expenses in outfitting each vessel, and when they made their claim for the loss of a vessel and her outfits, as far as the claim for outfits was concerned, they simply copied from their books the statement there contained for moneys expended in her outfits, and by which they can establish the claim for the same if ever they are called upon to do so.

Taking, then, this statement of outfits as correct and true, the estimate of Messrs. Cohen and Young leaves only $12 per ton as the average value they would place upon the whaling vessels, which value is by their own estimate only about one-quarter of the price at which vessels of the United States were sacrificed in England, and a much smaller proportion of what the same vessels were worth to citizens of the United States, provided they could have carried the flag of the United States free from the danger of being destroyed by the Alabama and other British-built cruisers.

Letter of Mr. Crapo.

In this connection, and as contrasted with the estimates of Messrs. Cohen and Young the Counsel refer to the following contract of a letter from Mr. Wm. W. Crapo, a very intelligent and respectable gentleman, under whose direction most of the claims for the destruction of the whaling vessels were prepared. (See his letter to the Secretary of State, vol. vii, U. S Doc., p. 103.)

He says:

As the attorney for numerous claimants, I have prepared and forwarded to the

State Department of the United States memorials and claims, setting forth the destruction, by Confederate cruisers, of a large number of ships and their cargoes, owned by merchants by New Bedford and its vicinity, and praying for suitable compensation for the loss of their property and the damages resulting therefrom. The claims thus prepared and forwarded represent nearly forty ships in number, with their whaling outfits and cargoes. The aggregate amount claimed by these persons for property destroyed is very large, and I beg leave to state the mode adopted in fixing values and estimating damages. Many of the ships, especially those burned by the Alabama, had but recently sailed from their home ports when destroyed. The values claimed for ship and outfits in such cases were based upon the actual cost and present worth of the property, as can be abundantly and conclusively proved when the occasion requires.

"The large number of whale-ships, for which claims have been presented by me, were destroyed by the Shenandoah in the Arctic Ocean. In computing the damage sustained by this destruction, prices were placed upon each vessel and its outfit which represented their value as they were in that distant ocean, and at a sum less than the cost of replacing them. The more valuable ships, with their outfits, were estimated as worth $60,000 each. This was the sum at which they were insured, in cases where insurance had been effected. This sum was less than the actual cost to the owners in replacing them at the home port, by vessels and outfits of equal quality. An appraisal of the several vessels by ship-builders and ship-brokers, and the vouchers for purchased outfits, will confirm the justness of the valuations made by the claimants."

In view of this letter of Mr. Crapo the Counsel maintain that this Tribunal ought not to make any diminution in the value placed upon these vessels and their outfits by the owners thereof.

Property destroyed.

The second division of claims under what has been called the first class, is the claims of merchants for the values of goods destroyed.

How proved.

An examination of the list of claims will show that these claims are generally proven by the sworn memorial of the merchant, setting forth that he owned them, that they were on board the vessel destroyed, and that they were of a certain value, which memorial is accompanied by the bill of lading and invoice, the one confirming the statement that they were on board the vessel, and the other the statement that they were of a certain value.

Though some few of these claim may have been increased by including in them the expected profits on the goods and the insurance on the same, as well as on the profits, (of the right to include which profits and insurance in all the claims, mention will be hereafter made,) yet we are confident that the true value of the goods represented in this class of claims is the price named in the claims; the claimants have made their claims expecting at some time to be called upon to prove the value of the property destroyed, by the production of the invoices which will show the prices paid for them. We cannot, therefore, in any way admit that Messrs. Cohen and Young are right in stating that they are confident that they are considerably overestimating the value of the goods at the port of shipment, by assuming such value, together with the interest up to the time of capture, to be only 12 per cent. less than the aggregate amount claimed in respect to the cargoes. (See vol. vii, British Appendix, pp. 25, 28.)

Oil or fish destroyed on whalers and fishing vessels.

Another division of claims under the first class embraces the claims of the owners of whaling and fishing vessels for the value of oil or fish on board, and destroyed at the time of their capture. These claims Messrs. Cohen and Young propose to estimate very easily by ignoring all claims made by the owners for secured earnings, and by allowing interest at the rate of 25 per cent. per annum on the value of the ship and outfit, and in addition 5 per cent. per ton per day to meet expenditures on account of wages and other disbursements. Such an easy calculation as this enables them to decide that the secured earnings of the forty-one whale-ships destroyed by the several cruisers, together with the wages of the officers and crews, and all other disbursements, amounted to but $301,759. Taken as a sample of other estimates made by Messrs. Cohen and Young after "careful consideration," (p. 18,) it may be well to examine this estimate a little more closely. Their estimate in round numbers is that the forty-one whalers, down to the time of their capture, had earned for their owners, their officers and crews, the sum of $301,759. The officers and crews of these whaling vessels, on an average, consist of at least twenty-five persons, and there were on board these forty-one whalers more than a thousand persons, captains, officers, and sailors, whose earnings and expenses in this most hazardous, but at that time most lucrative employment, are estimated at one-quarter of $301,759, (see p. 18 of report of Messrs. Cohen and Young,) or at about $75,000, which divided proportionately would give to each man not more than $75. When it is remembered that very few of these men had been away from home for less than six months, and that many of them had been away for two and three years, it is easy to see that the estimates made would not cover their expenses, much less their earnings.

Under these circumstances, knowing well the large profits that our hardy seamen have made in whaling voyages, we must earnestly protest against their claims for

actual earnings being so reduced, and farther on we shall again call the attention of this Tribunal to the claims of officers and sailors.

The proposal to substitute the estimate of Messrs. Cohen and Young seems by no means necessary or just in view of the facts, as stated by Mr. Crapo.

He says, (U. S. Doc., vol. vii, p. 104,) "Oil and bone on board, and destroyed with the ships, have been made the subject of claim. The quantity has been stated upon the sworn evidence of the masters and officers of the respective vessels, and the value has been ascertained by the current market quotations at the time when said oil and bone would, if not destroyed, have found a market and sale."

We are confident that enough has been stated to convince the Tribunal that the sworn statement of the masters and officers must be taken as better evidence of what was on board the whale-ships destroyed by the Alabama and Shenandoah than the so-called estimate of Messrs. Cohen and Young, who would make it appear that they have been able to arrive at the percentage which that oil and bone bear to the value of the vessels and outfits as again estimated by Messrs. Cohen and Young, and under these circumstances the attention of the Tribunal is particularly directed to the fact that this percentage is made to apply by Messrs. Cohen and Young, not to the whole length of the voyage of the several whalers, but in many instances only from the date when the ship sailed from Honolulu or some other port at which it had last touched.

Personal effects.

In regard to the claims of passengers, officers, and sailors for the values of personal property destroyed, Messrs. Cohen and Young estimate it at the rate of $5 per ton on the vessels captured by the Shenandoah, (see p. 17, Brit. App., vol. vii,) and at the rate of $3 per ton on some of the vessels captured by the other cruisers, (see pp. 17, 28, Brit. App., vol. vii,) and on other individual vessels they have chosen to make certain deductions, as to them seemed best.

Messrs. Cohen and Young state as a fact that the claims for personal effects, &c., on board vessels destroyed by the Shenandoah are made at the average rate of $8 per ton. Thinking this to be excessive, they give their opinion that if the loss of personal effects in the case of the Shenandoah "be estimated at the average rate of $5 per ton of the captured vessel, adequate compensation will be provided, especially as it appears from Captain Semmes's journal, and other sources of information, that in many cases the masters and crews had ample opportunity of saving a considerable part of their property." Messrs. Cohen and Young may have found the above statement to be satisfactory to themselves; but we do not expect that this Tribunal will find in the journal of Captain Semmes, who probably never even saw the Shenandoah, any evidence as to the value of the personal effects of the passengers, officers, and crew of the vessels burned by that cruiser.

Possibly some of the claims of this class may be exaggerated. But, on the other hand, a large quantity of personal property was destroyed on board these vessels, which, though small in the amount belonging to each individual, was large in the sum total, and for which no claim has yet been made. And further, as to some of the claims made for personal property on board the whaling vessels destroyed by the Shenandoah, the officers and captains had with them articles of various kinds, and of considerable value, for the purpose of trading with the natives; and it is for such kind of property that we understand that the claims of the master and two of the crew of the Abigail were made, as also the claim of the master and mate of the Gipsey.

If the estimates of Messrs. Cohen and Young cannot be depended upon when made as an average, still less can they be when an attempt is made to estimate particular claims. (See p. 25, Brit. App., vol. vii.) Remembering that Messrs. Cohen and Young have no other knowledge of the claimants, or of what property they have lost, than can be obtained from the list of claims, we are at a loss to know why these gentlemen should decide that the claims of the captains of the Brilliant and C. Hill should be made to be equal to each other, or why the claim of the chief officer of the Express seems to be excessive, or why any of the other deductions proposed should be made, unless, as in the case of the Alina, the value of the personal effects of the captain seems by them to have been considered as having some ratio to the tonnage of the vessel.

Claims of insurance companies.

The claim of insurance companies for the value of property destroyed, for which they have paid the owners the insurance, is the last division under the claims of the first class.

No double claims supported by the United States.

We readily admit that, whenever the owner puts forward a claim for his loss at the same time that the insurance company also claims the money paid by them in respect of the same loss, then only one value of the property destroyed can be allowed; but we insist that, in all such cases, the award should be equal to the full value of the property destroyed.

It was the intention of the United States, in preparing the list of claims, to indicate whenever double claims of this class occurred, when it was evident, upon a simple examination of the papers, that such double claims were made, and it will be found that very few, if any, of such claims exist, except in the case of some of the whaling vessels which were destroyed by the Shenandoah, there being none of this class of double claims in the case of merchant ships, or property destroyed on merchant ships.

As to the claims of the second class for the loss of charter-parties or freights, it is possible that in a certain sense double claims may, in a few instances, have been made by the owners of the ship, and by the charterers; but these double claims are of an amount almost inappreciable as compared with the sum total.

Charter-parties or freights.

There may also be some claims of the second class for the loss of profits on goods and other merchandise which do include the freight and insurance paid on these goods. But we believe that these claims should be allowed to the full extent of the freight and insurance paid, for, at the time the goods were destroyed, they had cost the merchant what he had paid for them, together with the freight and insurance he had paid upon them, and certainly the value of those goods to him cannot be considered as less than this aggregate.

Loss of profits.

Claims have been advanced for what may be considered as prospective losses in the loss of the voyage of a chartered ship, in the destruction of goods shipped to be sold at a large profit in a distant part, or in the breaking up of a whaling season which has just begun in a remote sea.

All claims of this kind Messrs. Cohen and Young think should be absolutely rejected; but we maintain that such a rejection would be directly contrary to the general language of the Roman law: "Quantum mea interfuit; id est, quantum mihi ab est quantumque lucrari potui," and would also be contrary to the existing rule of the common law, which is thus stated in the last edition of Sedgwick on Damages, page 86, note:

"It may now be assumed to be the general rule that in actions of tort, where the amount of profits of which the injured party is deprived, as a legitimate result of the trespass, can be shown with reasonable certainty, such profits constitute to that extent a safe measure of damages. In these cases the rule adopted with reference to certain breaches of contract which makes the offending party liable for the loss of profits, so far only as he foresaw, or should have foreseen that particular consequence of his act, does not apply. He who commits a trespass must be held to contemplate all the damage which may legitimately follow from his illegal act, whether he might have foreseen it or not, and, so far as it is plainly traceable, he should make compensation for it. To this extent the recovery of a sum equal to the profits lost while fairly within the principle of compensation, is also within the limits which exclude remote consequences from the scale in which the wrong is weighed."

Loss of profits a part of the damages in actions in tort.

It may be true that in some instances the courts of the United States and England, bound down by the rules of law in previous cases, have reduced the award for prospective damages in the destruction of a vessel and her cargo, to the low and average rate of interest upon loaned money; and thus, though it is well known that the profits for maritime and mercantile adventures are generally much greater than those obtained from the loan of capital at the ordinary rate, the injured party has been made to suffer from the inability of the court, who, though they recognize the justice of the claim, are limited by the checks on their power to estimate. In regard, however, to the claims presented to this Tribunal for damage by the loss of profit, we confidently expect that an award will be made which will bear a due relation to the great actual damage caused.

What has been already said as to the loss by the breaking up of a merchant voyage, or by the destruction of goods, applies much more strongly to the breaking up of a whaling or fishing voyage. Writing of vessels engaged in these voyages, Mr. Crapo says, (7 U. S. Docs., p. 194:)

Breaking up voyages of whaling vessels.

"The vessels destroyed had entered upon their cruises, and were engaged in the prosecution of their whaling voyages. Most of the ships had sailed many thousands of miles from their North Atlantic home ports, around Cape Horn, and, traversing the length of the Pacific Ocean, had reached their whaling-grounds in the Arctic. Many months had been consumed in the passage. The ships engaged in this business leave home in the months of September and October, and reach their cruising-grounds the following May, and then entering the ice of that northern ocean, penetrating it as it breaks up in summer, commence their whaling in June, and continue the taking of their cargoes until the storms of September compel them to make their way out of Behring's Straits, whence they proceed to recruit for another season's work, or for the passage home. When the Shenandoah destroyed the twenty-six whale-ships in the North Pacific and Arctic, these vessels had entered upon the portion of their voyages which was to remunerate them for the long passage from home and the long passage back again, which passages would add little or nothing to their cargoes. Hence, the portion of the voyage which brings to the owners and crew a return for their capital and labor is embraced in a few months of summer whaling. The great expense involved in sailing these vessels into distant seas had been incurred when the Shenandoah came upon them and burned them. If they had not been molested, they would have obtained their accustomed catch, and the owners and crews would have received the usual return for their outlay and labor. If, then, the claim of a merchant-vessel for the freight-money she would have earned upon the delivery of her cargo, if she

had not been destroyed, is a just and legitimate one, and recognized as one for compensation, then the claim for 'prospective catch' is equally just and legitimate.

"Another consideration for the allowance of 'prospective catch,' which presents itself with much force, is the interest which the captured seamen have in it. The masters, officers, and crews of whale-ships are not paid by monthly wages, as in the merchant marine, but by 'lays' or shares in the oil and bone taken. Their proportion of these catchings amounts to a percentage varying from 30 to 40 per cent. of the whole cargo. These men encounter the dangers and toil of this peculiarly hazardous business, and their remuneration for the support of themselves and families is dependent upon the catch of whales during the short season of summer. If no allowance is made for prospective catch, these men receive nothing for their many months of toil and exposure. This business, when undisturbed by violence, is sure of a return. As certain as the harvest to the farmer, is the catch of oil to the whaleman. The average catch of whales is well known and understood by the merchant and the seaman. Upon this knowledge of probable average catch the sailor readily procures an advance before sailing, and his family obtain necessaries and a support during his absence. In case of his death or disability during the voyage, and before any cargo has been obtained, he or his family share in the whole catch of the voyage, in the proportion of his term of service to the entire period of the voyage. By the burning of the Arctic fleet, Captain Waddell, of the Shenandoah, left these men utterly helpless thousands of miles away from their homes, and with no means of returning to them. He destroyed not only all their personal effects, but he destroyed also the earnings of a whole year of service, and burdened them with the debts contracted at home for the support of their families during their absence.

"Whatever money is obtained from the English Government for loss of prospective catch, is, under the provisions of the shipping articles, subject to division among the officers and crews, in the proportion of their respective 'lays.' Hence the amount embraced in this item of the claims is not entirely profits of the owners, but represents damage to officers and crew, as well as loss of outlay and capital, and the expenses incident to this business.

"In preparing the claims which have been presented to you, the claimants have varied in the amounts for which they ask compensation under the item of prospective catch. This variation arises from the fact that whale-ships are fitted for voyages of from three to five years in duration, and while some of the ships destroyed had partially completed their voyages, others were upon their first season. The estimates of oil and bone have been based upon the average takings of these and other vessels engaged in such voyages as they were prosecuting. Carefully prepared, accurate, and reliable statements have yearly been collected by those interested in these fisheries, which exhibit the total quantities of oil and bone taken, and the number of vessels employed, both in the sperm and right-whale fisheries. An examination of these yearly statements will demonstrate that the claims for prospective catch are not fictitious or excessive.

"The prices affixed in these estimates of 'prospective catch' have mostly been determined by ruling rates for oil and bone where the same is marketed, at times when the same would have found a market."

We are confident that if this Tribunal shall determine to award a sum in gross, it will find, in the facts above stated, and in the general principles of equity and justice, abundant ground for making an estimate in that award of damages which claimants have sustained in the loss of profits on goods in freight, or for merchant voyages, but above all for those great losses which owners, officers, and crew have experienced in the sudden breaking up of the long-continued but yet just begun whaling voyage.

Claims of the officers and crews.

On page 471 of the Case of the United States, it is stated that "it is impossible at present for the United States to present to the Tribunal a detailed statement of the damages or injuries to persons growing out of the destruction of each class of vessels. Every vessel had its officers and its crew, who were entitled to the protection of the flag of the United States, and to be included in the estimate of any sum which the Tribunal may see fit to award. It will not be difficult, from the data which are furnished, to ascertain the names and the tonnage of the different vessels destroyed, and to form an estimate of the number of hardy, but helpless, seamen who were thus deprived of their means of subsistence, and to determine what aggregate sum it would be just to place in the hands of the United States on that account. It cannot be less than hundreds of thousands, and possibly millions of dollars."

To this statement, and to this class of claims, we again call the attention of the Tribunal, feeling confident that Her Majesty's Government will agree that they are just, being in accordance with a recent decision of Sir Edward Thornton, one of Her Majesty's High Commissioners in the making of the Treaty under which this Tribunal is now sitting, which decision was given in July, 1870, when he was acting as arbitrator on a question that had arisen between the United States and Brazil, as to the liability of Brazil to make compensation to the United States for the loss of the whale-ship

Canada, of New Bedford, through what was alleged to have been the improper interference of certain officers of the Government of Brazil. In that case, Sir Edward Thornton decided that the Government of Brazil was responsible for the damage caused by the loss of the Canada, and in his award said: "Certain expenses incurred for the maintenance and passage home of the crew, as also three months' wages to each of the crew, being the amount which all owners of vessels of the United States are bound to pay to seamen discharged abroad, the undersigned considers to be justly due;" and in his award allowed for these items, estimating the wages of the mate at $100 per month, the wages of the second mate at $75 per month, the wages of the third mate at $60 per month, the wages of the fourth mate at $50 per month, the wages of the four boatswains at $40 per month, the wages of four other boatswains at $30 per month, and the wages of fourteen men, sailors, &c., at $12 per month, thus awarding over $3,000 for the three months' wages, and for the expenses home of the officers and crew.

We do not desire in any way to be understood as restricting the damages which they claim in behalf of the officers and crews of the vessels destroyed by the Alabama and other cruisers, either to the limits of length of time or of wages per month as given by Sir Edward Thornton. But we have referred to his opinion principally as evidence that such claims are "justly due." It will be for this Tribunal, taking into its consideration the distant places in which many of the vessels of the United States were burned, to determine what reasonable estimates shall be made of the damages caused to the officers and sailors.

The Counsel desire here to call the attention of the Tribunal to the revised List of Claims which was filed with the Counter Case of the United States, from an examination of which it will appear that the amount of the claims filed for injuries from the captures made by the several cruisers has been considerably increased, and that the sum of such claims without interest was $19,739,094.81.

II.

ARGUMENT OR SUMMARY

SHOWING THE POINTS AND REFERRING TO THE EVIDENCE RELIED UPON

BY THE

GOVERNMENT OF HER BRITANNIC MAJESTY.

IN ANSWER TO THE

CLAIMS OF THE UNITED STATES:

PRESENTED TO THE

TRIBUNAL OF ARBITRATION

CONSTITUTED

UNDER ARTICLE I OF THE TREATY CONCLUDED AT WASHINGTON ON THE 8TH MAY, 1871, BETWEEN HER BRITANNIC MAJESTY AND THE UNITED STATES OF AMERICA.

ARGUMENT.

Her Britannic Majesty's Government now presents to the Tribunal of Arbitration, under the fifth article of the Treaty of Washington, a summary of the chief points on which Great Britain relies in argument, in answer to the claims of the United States. This summary will principally consist in a recapitulation of the more material facts and considerations already placed before the Arbitrators in the Case and Counter Case of Great Britain.

It will be obvious that Her Majesty's Government, having cast upon it the duty of defense against these claims, can only meet the arguments on the part of the United States as they are from time to time brought forward. Those arguments which were brought forward in the original Case of the United States it has endeavored to answer fully and explicitly in the British Counter Case, to which it now desires to refer. The arguments of that Counter Case, and the statements of facts and evidence contained in it, and in the original Case of Great Britain, and the Appendices to both those Cases, are necessarily the arguments and the evidence on which the Government of Great Britain now relies; and all that it is possible, at present, usefully to do, is to sum up, in a condensed form, the general substance and results of those arguments and evidence, with some additional remarks made necessary by new matter contained in the Counter Case of the United States (itself a brief document, entering into few or no details of argument) and the Appendices thereto, or arising out of the evidence originally put in by the United States.

Her Majesty's Government infers from the Counter Case of the United States, that it is the intention of the Government of the United States to enter, at the present stage of the proceedings, at some length into controversial arguments, in which it may possibly take occasion to offer such replies as may seem to it proper to the Counter Case of Her Majesty's Government. Should this prove to be the fact, Her Majesty's Government fully relies upon the justice of the Arbitrators, who will doubtless avail themselves of the opportunity of calling for further statements or arguments upon any points, either of law or of fact, which may not have been adequately dealt with by anticipation on the part of Her Majesty's Government.

Scope of the Arbitration.

1. The questions which the Tribunal of Arbitration is called upon to decide, relate to certain claims which the United States conceive themselves to have against Great Britain, founded on circumstances which occurred during the late civil war in the United States. These claims are defined in the Treaty of Washington, 8th May, 1871, as having arisen out of the acts of certain vessels which are referred to, but not designated by name, in the Treaty; and the claims are further defined by a generic or class description, which had been appropriated to them, and under which they had become known to the two Governments, before the date of the Treaty.

Course of proceeding to be followed by the Tribunal.

2. The course of proceeding to be followed by the Tribunal is pointed out by the Treaty. The Tribunal is to determine, *as to each vessel separately*, whether Great Britain has by any act or omission failed to fulfill any of the duties set forth in three

"Rules," laid down for this purpose in the Treaty, (Article VI,) or recognized by the principles of international law not inconsistent with such Rules, and to certify such fact as to each of the said vessels. This is the first duty of the Arbitrators. Their second duty (which will arise only in case they find that Great Britain "has failed to fulfill any duty or duties as aforesaid") is confined to adjudicating, either by the award of a gross sum or by determining the extent of liability, on the pecuniary reparation, if any, which in that event should, in their judgment, be made to the United States by Great Britain. It follows that any alleged failure of duty, which should not consist in an act or omission as to one or more of the particular vessels indicated, would not be within the cognizance of the Arbitrators. Great Britain recalls attention to this, not because she has any doubt of her ability to give a conclusive answer to any charge whatever that might be brought against her, of having, in any way or in any particular, imperfectly discharged her international duties, but because it is on all accounts right and necessary that the limits of a reference to Arbitration, jointly agreed to by the parties in difference, and embodied in a solemn Treaty, should be strictly observed.

Vessels to which the claims of the United States relate.

3. The vessels as to which (and as to which alone) the United States are at liberty to prove, if they can, a failure of duty against Great Britain, are referred to in the Treaty as "the several vessels which have given rise to the claims generically known as the 'Alabama claims.'" The only vessels in respect of which any claims had been made by the Government of the United States upon Great Britain from the commencement of the civil war up to the time of the conclusion of the Treaty, were the Florida, Alabama, Georgia, and Shenandoah; and these claims had, in the correspondence which passed between the two Governments, become generically known as the "Alabama claims;" a phrase understood by Great Britain to mean claims, on account not only of the Alabama herself, but of other vessels respecting which complaints had been made of a like character, and on like grounds, to those made respecting the Alabama.[1]

4. The United States have specified in their Case "the cruisers, for whose acts" they "ask the Tribunal to hold Great Britain responsible." The list includes, beside the Florida, Alabama, Georgia, and Shenandoah, certain small vessels alleged to have been armed and employed as tenders of the Florida and Alabama, and also five other vessels, in respect of none of which any claim had previously been made against Great Britain, and of which three were never obtained from, much less equipped within, the dominions of Her Majesty; whilst the remaining two were built and sold as vessels of commerce, and had ceased to have any connection with Great Britain before they were adapted or used for any purposes of war. Great Britain has not thought proper to insist on the objection that the additional vessels, in respect of which no claims had previously been made, ought, on that account alone, to be rejected from consideration by the Tribunal, as not falling within the description inserted in the Treaty. But she contends that it is contrary to the true meaning of the Treaty to bring forward new claims in respect of any vessels, on grounds not falling within any of the three Rules in Article VI, nor within the principle of any claim which had been previously made; and she insists that no award in respect of any of these vessels ought to be made by the Arbitrators.

5. It is clear, at any rate, that the claims of the United States must,

[1] British Case, p. 3.

in this Arbitration, be confined to those vessels which are specified in their Case as "the cruisers for whose acts the United States ask the Tribunal to hold Great Britain responsible." Nevertheless, the United States have introduced into the list of claims, appended to their Case, claims for captures made by two Confederate cruisers (the Boston and Sallie) which are not among the vessels specified in the Case itself. They have likewise inserted in the same list claims for expenses said to have been incurred in relation to the Chesapeake and Rappahannock, which again are not among the specified vessels. Further, they have, at the time of presenting their Counter Case, added claims for captures made by the Jeff. Davis, the V. H. Joy, and the Music, three other Confederate vessels, neither specified in the Case among those in respect of which reparation was claimed, nor even so much as mentioned in it.[1] It must be added that the United States have not assigned any ground or reason for the claims which they make on account of the vessels not so specified. No failure of duty has been charged against Great Britain in respect of any of them. Yet the United States claim for captures made by them, and for expenses said to have been incurred in trying to capture them, without alleging, in support of the claim, anything which Great Britain can answer. And, in the case of the Jeff. Davis, the V. H. Joy, and the Music, the claims have been put in after the expiration of the period within which evidence could be presented by Great Britain.

6. Her Majesty's Government had supposed, and had so stated in its Counter Case, that the claims presented in the Appendix to the Case of the United States, on account of vessels not mentioned in the Case itself, had been introduced by inadvertence.[2] But the subsequent addition of claims for captures by the Jeff. Davis, the V. H. Joy, and the Music, appears to be inconsistent with this supposition. It is necessary, therefore, for Her Majesty's Government to declare, in the most explicit manner, that claims in respect of vessels not specified in the Case of the United States, among those "for whose acts the United States ask the Tribunal to hold Great Britain responsible," are not, in the view of Her Majesty's Government, open to argument or discussion, since they cannot properly be taken into consideration by the Arbitrators for any purpose whatever.

7. In connection with this point it is necessary here to take notice of the following statement introduced into the Counter Case of the United States:

> Her Majesty's Government assume that the reclamations of the United States are to be confined to claims growing out of the acts of the Florida, the Alabama, the Georgia, and the Shenandoah. The claims growing out of the acts of the other vessels named in the American Case are regarded by the United States as also embraced within the terms of the treaty. They form part of the claims generally known as the "Alabama claims." They are enumerated in the fourth of a series of five volumes, printed by order of the Senate of the United States, which are part of the "documents, correspondence, and evidence," submitted with the Case of the United States. These volumes, when thus collected and printed, were entitled "Claims of the United States against Great Britain." It is believed that under that title they were in the library of the Foreign Office at London before Her Majesty's High Commissioners received their instructions. It may also be said, without impropriety, that under the same title they were on the table of the Joint High Commission during the negotiations which preceded the conclusion of the treaty. The United States, therefore, while re-asserting their construction of the language of the Treaty in this respect, feel that they have the right to ask the Arbitrators to assume that Her Majesty's High Commissioners had notice of, and acquiesced in, that construction.[3]

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[1] See Revised List of Claims, pp. 219, 290.
[2] British Counter Case, p. 2.
[3] Counter Case of the United States, sec. i, par. 2.

In vol. iv, pp. 446–475, of the Appendix to the Case of the United States, the Arbitrators will find the document referred to in the above paragraph. It purports to be a "list of American vessels captured and destroyed by rebel vessels during the late war," and to be compiled in answer to a resolution of the House of Representatives, requesting information "relating to the destruction during the late war, by rebel vessels, of such American vessels as were engaged in trade or commerce." This list contains the names of certain Confederate ships—twenty-three in number, (not, however, including the V. H. Joy and the Music, which are now for the first time mentioned)—with the captures made, or alleged to have been made by them, respectively, so far as information on the subject had been received at that time by the Department of State. Of these twenty-three ships, four (the Alabama, Florida, Georgia, and Shenandoah) are described as having been fitted out in or from British ports; three others as having been tenders to the Florida; one as having been a tender to the Alabama; twelve others (among which are the Boston, Chickamauga, Jeff. Davis, Nashville, Retribution, Sallie, Sumter, and Tallahassee) as having been fitted out in the Confederate States. Three (among which is the Olustee) are entered without any indication of the place of equipment. It is now said, in effect, that, because this list, which purports to be a return of *all* captures made during the war by Confederate armed ships, *wheresoever fitted out and under whatever circumstances*, was subsequently bound up, with a multitude of other documents, in one of five large volumes presented to the Senate of the United States, under the general title "Correspondence concerning Claims against Great Britain," the British Government must be deemed to have had notice that the United States would attempt to charge all such captures against Great Britain. Her Majesty's Government will merely say that such an intention was one which it would not have deemed itself justified in supposing on the part of the United States, unless it had been clearly expressed. Yet it appears that the United States have actually proceeded on this principle in presenting their claims to the Arbitrators; although, for some reason not yet explained, they have hitherto abstained from extending those claims to every ship which the principle would seem to include.

8. Attention has been drawn in the Counter Case of the United States (sec. iii, par. 2) to a statement made in the British Case that "in and soon after the month of May, 1861, a number of armed ships were fitted out and sent to sea from ports in the Confederate States," and it is observed that, if it be intended "to lead the Arbitrators to suppose that there was any insurgent vessel preying on the commerce of the United States when the Florida or when the Alabama escaped from Liverpool, the United States cannot too strongly protest that Her Majesty's Government is in error in this respect."

The following are the dates of the cruises of the several vessels mentioned in the list in vol. iv of the Appendix to the Case of the United States, omitting the Florida, Alabama, Georgia, Shenandoah, and their tenders: Calhoun, (fitted out at New Orleans,) May, 1861; Savannah, (fitted out at Charleston,) June, 1861; Jeff. Davis, (fitted out at Charleston,) June to August, 1861; Winslow, (fitted out at Wilmington,) July to August, 1861; Sumter, (fitted out at New Orleans,) July, 1861, to January, 1862; York, (place of fitting out not mentioned,) August, 1861; Sallie, (fitted out at Charleston,) October, 1861; St. Nicholas, (captured by the Confederates in Chesapeake Bay,) June and July, 1862; Echo, (place of fitting out not mentioned,) July, 1862; Retribution, (fitted out in Cape Fear River,) January and February, 1863; Boston, (place of

fitting out not mentioned,) June, 1863; Tallahassee, (fitted out at Wilmington,) August, 1864; Chickamauga, (fitted out at Wilmington,) October, 1864; Olustee, (place of fitting out not mentioned, alleged to have been identical with the Tallahassee,) November, 1864.

The Florida left Liverpool on the 22d March, 1862, and was detained at Nassau till the 7th August following; the Alabama left Liverpool on the 29th July of the same year. Five captures are recorded in the list as having been made in the interval between the 22d March and the 29th July, 1862, by the vessels Echo and St. Nicholas.

It may be added that, as early as the 4th June, 1861, Her Majesty's Government was informed by the British Minister at Washington that "the privateers of the Confederate States were at that moment in full activity, and had met with considerable success."[1]

Nature of the argument on the part of Great Britain.

9. The argument to be offered on the part of Great Britain will be strictly confined, in the first instance, to the question whether, as to any one or more, taken one by one, of the vessels specified in the Case of the United States as "the cruisers for whose acts the United States ask the Tribunal to hold Great Britain responsible," Great Britain did, by any act or omission, fail to fulfill any duty set forth in the three Rules, or recognized by the principles of international law not inconsistent with those Rules. This is the single question with which the Arbitrators have, in the first instance, to deal. On the questions, therefore, whether, in regard to the general traffic in munitions of war or in other articles, between ports of Great Britain or her colonies and the Confederate States, or in regard to the general employment of agents of the Confederate Government for financial and other purposes in England, or in regard to the general partiality erroneously alleged to have been shown to Confederate vessels in British and colonial ports, the British Government did, or did not, fail in the performance of any of its neutral obligations—on these questions, and such as these, Great Britain, while referring the arbitrators to the statements as to both law and fact, contained in her Case and Counter Case, and the Appendices thereto, forbears to offer any new argument before the Tribunal. She has fully and amply vindicated the conduct of her Government on all these heads. But she declines to treat them as presenting, apart from the questions as to the particular cruisers, legitimate matter for argument between the parties to the reference, or elements for the consideration of the Tribunal.

The Sumter, Nashville, Tallahassee, Chickamauga, and Retribution.

10. As regards the Sumter, Nashville, Tallahassee, Chickamauga, and Retribution, Great Britain has been unable to discover in the Case or Counter Case of the United States any reasonable or intelligible ground for making the acts of these vessels, or the conduct of the British Government in respect of them, the foundation of claims against her. It will be sufficient, therefore, to refer the Tribunal to Part II of the British Case, and Parts V and VIII of the British Counter Case, in which the facts relating to these vessels are stated and commented on.[2]

11. It will be seen—

(*a*.) That in the case of the Tallahassee and Chickamauga, no failure of duty has been even alleged, much less proved, against Great Britain. These vessels were built, indeed, in England, but they were built, and were used, as ships of commerce; it was by an after-thought, when they were already within the waters of the Confederate States, and had be-

[1] Appendix to Case of United States, vol. i, p. 56.

[2] See also British Counter Case, Part IX, pp. 107, 108, as to the Sumter and Nashville, and p. 114 as to the Chickamauga.

come the property of the Confederate Government, that they were armed for war, and their employment as ships of war lasted but a few weeks in the one case, and but a few days in the other. They were armed in and dispatched from a Confederate port, (Wilmington,) and to the same Confederate port they returned.[1]

(*b.*) That the Sumter and Nashville were not even built in the Queen's dominions; and in respect of their original outfit, nothing is, or can be, alleged against Her Majesty's Government. Setting aside some other minor complaints, which will not bear a moment's examination, it is suggested only that they received in British ports such hospitalities as were extended to Confederate vessels in general in the ports of neutral nations.[2]

(*c.*) That, in the case of the Retribution, also a vessel not built or fitted out in the Queen's dominions,[3] the facts alleged show nothing more than that her commander contrived on one occasion, by fraudulently personating the master of a prize captured by him, and concealing the fact that she was a prize, to dispose of the cargo in a small island of the Bahama Archipelago, remote from the seat of government; and that, on another occasion, by means of a fraudulent conspiracy with a party of "wreckers," he managed to carry a prize into the same place, and to extort, through the wreckers, from her master and owners, a ransom, under pretense of salvage.[4] These facts, if proved, establish no failure of duty against Great Britain.[5]

12. As to the vessels said to have been employed as tenders by the Florida and Alabama, no failure of duty is alleged against Great Britain. The only question, therefore, which can arise in connection with them is, whether, in case any liability should be established against Great Britain in respect of the Florida or Alabama, such liability should be extended to the acts of these vessels.

The Clarence, Tacony, Archer, and Tuscaloosa.

13. The discussion, therefore, in the view of Great Britain, confines itself practically, as well as of right, to the Alabama, Florida, Georgia, and Shenandoah, the four vessels on account of which claims had been made by the United States against Great Britain before the conclusion of the Treaty of Washington.

The Alabama, Florida, Georgia, and Shenandoah.

Substance of charges.

As to these vessels, the material charges made by the United States appear to be in substance as follows:

(*a.*) That the British Government did not exercise due care to prevent them from being equipped or specially adapted within British territory for war against the United States;

(*b.*) That the British Government did not cause them to be arrested or detained when they subsequently visited ports within the colonial possessions of Great Britain;

(*c.*) That they were suffered, in such ports, to obtain supplies and effect repairs, of a nature, or to an extent, inconsistent with the obligations of Great Britain as a neutral power.

14. It is not incumbent on Great Britain to prove that these charges are erroneous. It is for the United States to prove that they are true. But since the evidence of the real facts applicable to each of these ves-

[1] British Counter Case, p. 102. Appendix to British Case, vol. v, p. 143; Appendix to Case of the United States, vol. vi, pp. 723–726, 728–730.

[2] British Case, pp. 12–22. British Counter Case, pp. 67–71, 107–109. Appendix to British Case, vol. ii, pp. 1–82, 87–129.

[3] Case of the United States, p. 390; Appendix to Case of the United States, vol. vi, p. 736.

[4] British Counter Case, p. 104. Appendix to British Case, vol. v, pp. 21–24, 165–197.

[5] See British Counter Case, Part X, pp. 126, 127.

sels is before the Tribunal, Great Britain will proceed to state the principles which, in her view, ought to be applied to these facts.

15. In view of the arguments which have been employed in the Case of the United States, the British Government will refer, in the first place, to the general principles of international law which were in force at the time when the facts occurred, setting aside for the moment the three Rules which have been adopted by Great Britain and the United States, and inserted in the sixth article of the Treaty of Washington.

General principles of international law in force when the facts occurred.

16. The general principles of international law are such only as have been settled by the general consent of nations. For evidence of this general consent, it is customary to refer to the works of text-writers of acknowledged merit, who have made it their business to examine the sources from which such evidence may be legitimately drawn. Opinions, however, of individual publicists, judicial decisions of the tribunals of a particular country, acts of any one State or Government, cannot by themselves establish a rule of international law; they can only contribute toward the formation of such a rule, or to the proof of its existence. It is to be added that acts of a State or Government, when used for this latter purpose, ought to be shown to have proceeded from a sense of international obligation, and not from motives of policy or international comity.[1]

17. Under the general principles of international law, a broad distinction is drawn, in reference to the question of national responsibility, between the acts of a sovereign State or Government and those of individual citizens or subjects of the State or Government. And a further distinction is drawn between acts of individuals which the Government is under an obligation to prevent so far as it is able, and acts as to which the Government owes only a negative duty, the duty of not protecting the persons by whom they are done from penal consequences, which the law of nations attaches to them.[2]

18. These distinctions rest on the principle that, while a Government has complete control over its own acts, and may therefore with justice be held completely responsible for them, the control which it can exercise over the acts of its subjects is of necessity very limited and imperfect. This control is limited on all sides by the very nature of civil government, and by the principle of individual liberty; by considerations both of what is generally practicable and of what is generally expedient.

19. By the general principles of international law in force when the facts now in question occurred, a neutral Government was not under an obligation to prevent or restrain the sale within its territory, to a belligerent, of articles contraband of war, or the manufacture within its territory of such articles to the order of a belligerent, or the delivery thereof within its territory to a belligerent purchaser, or the exportation of such articles from its territory for sale to, or for the use of, a belligerent.[3]

20. A ship, specially adapted for warlike use, had been held by publicists in general to belong to the class of articles which are contraband of war. The citations given in Annex A to the British Counter Case from Hübner, Tetens, Galiani, Lampredi, Azuni, Rutherforth, Martens,

[1] For argument on this point, see British Counter Case, pp. 6–11.

[2] See Heffter and other writers, quoted in Annex (A) to the British Counter Case, (pp. 143, *et seq.*)

[3] See British Case, p. 23; and precedents quoted in British Counter Case, pp. 49, 50, (note.)

Piantanida, Story, Wheaton, and Heffter, abundantly prove this position. Neither the sending of such a vessel from a neutral to a belligerent country for sale to the belligerent Government, nor the sale of it within the neutral territory to a belligerent Government or its agents, was regarded as an act which, by the general principles of international law, the neutral Government was under any obligation to prevent. (Lampredi, Azuni, Story, Wheaton.) By one well-known writer, (M. Hautefeuille,) it had even been contended that such a vessel, if not actually armed, was not to be regarded as contraband of war, but was an object of legitimate commerce, whatever might be her force and whatever the character of her construction.

21. It was immaterial, in the view of international law, whether the vessel were sold in the market, when completed, to the belligerent purchaser, without any contract prior to her completion, or were built to the order of the purchaser. In each case the belligerent purchaser acquired an implement of war by means of a commercial transaction with a private person in the neutral country, and the adverse belligerent sustained in the one case no injury which he did not sustain in the other.

22. If, therefore, the facts brought to the knowledge of a neutral Government consisted only in this, that a vessel specially adapted for warlike use had been, or was about to be, acquired within the neutral territory by a belligerent Government or its agents, or that such adaptation was in progress in order to the delivery of the vessel to the belligerent purchaser, the neutral Government was not bound to interfere.

23. The general principles of international law did, on the other hand, require that a neutral Government, having reasonable ground to believe that any port or place within its territory was being used, or was about to be used, by either belligerent as a base or point of departure for a military or naval expedition against the other, should exert reasonable diligence to prevent this abuse of neutral soil. Publicists had not attempted to define the meaning of the expressions employed above; they had commonly had recourse to simple and obvious illustrations, such as the assembling of an armed force ("*rassemblement militaire*") or the fitting out of privateers to cruise from a neutral port, ("*ausrüstung von Kapern*,") as was done in France in and after 1776, and in the United States in and after 1793. The circumstance that the several constituent parts of a military or naval expedition (such as men, arms, a ship or ships) had been separately procured from a neutral country, has never been held sufficient to convert the neutral country into a base or point of departure for the expedition. In the celebrated case of the Independencia, which came (under the forensic title of the Santissima Trinidad) before the great American Judge Story, the ship, which had been originally built and equipped at Baltimore as a privateer, during the war with Great Britain, was sold after the peace to new owners, who dispatched her from that port, loaded with a cargo of munitions of war, and armed with twelve guns, (constituting a part of her original armament,) under the command of Captain Chaytor, an American citizen, on a voyage ostensibly to the northwest coast, but in reality to Buenos Ayres; the supercargo being instructed to sell the vessel to the Government of Buenos Ayres, (then in revolt and at war with Spain,) if he could obtain a suitable price. At Buenos Ayres the vessel was sold to Captain Chaytor himself and two other persons; and soon afterwards she assumed the flag and character of a public ship, and was understood by the crew to have been sold to the Government of Buenos Ayres. Captain Chaytor made known these facts to the crew, and asserted that he had become a citizen of Buenos Ayres, and had received a commis-

sion to command the vessel as a national ship; he invited the crew to enlist in the service, and the greater part of them accordingly enlisted; and the ship afterwards cruised, made prizes, and was recognized in the United States as a public ship of war of Buenos Ayres. This whole transaction was held lawful in the Courts of the United States; while certain augmentations of the force of this vessel, subsequently made in a port of the United States, were, by the same Courts, held unlawful.[1]

No publicist, again, had undertaken to determine what ought to be held a reasonable measure of care or diligence, nor to resolve the question what grounds of belief—or, in other words, what evidence—ought to be deemed sufficient for a Government to act upon.

All equipments, which by their nature were applicable indifferently to purposes of war or commerce, were by the instructions issued by the Government of the United States in 1793 declared to be lawful, whatever might be the character of the vessel, or her actual or intended employment.[2]

24. In the first of the three Rules laid down in the Treaty of Washington the duties of a neutral Government are defined, with some increase of strictness as well as of precision. According to this rule, a neutral Government is bound to use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable grounds to believe is intended to cruise or to carry on war against a power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been especially adapted, in whole or in part, within such jurisdiction, to warlike use.

The three Rules of the Treaty of Washington.

25. The reasonable construction of this rule appears to require that the intention as to the future employment of the vessel should be an actual, present, fixed intention, not contingent on the happening of some uncertain event; that the contemplated employment should be proximate, not remote; and that the intention should exist at the time when the alleged obligation to interfere arises—either when the vessel is being fitted out, armed, or equipped in the neutral port, or when, after receiving there her special adaptation for war, she is about to depart from the neutral territory. The equipment, the departure, which the neutral Government ought to use due diligence to prevent, is an equipment, a departure, with an intention that the vessel shall be employed in operations of war, and with a view to her employment in such operations.

26. As to the character of the belligerent intention which, coupled with the act of equipment or special adaptation for war, makes it, according to the rule, the duty of the neutral Government to interfere—as to the nature or the grounds of the belief on which the neutral Government ought to act—as to the measure of diligence or care which it is bound to exercise—as to these, the rules introduce no new principle, nor do they augment the breadth or stringency of any principle previously recognized. It was never supposed that a neutral Government was or could be bound, under any circumstances, to prevent the fitting out of a vessel, unless it had reasonable grounds to believe that she was intended to cruise or carry on war against a power with which the neutral was at peace. The words "due diligence," in the three Rules, exact from the neutral, in the discharge of the duties therein stated, that measure of care, and no other, which is required by the ordinary

[1] Appendix to British Case, vol. iii, pp. 85–90.
[2] British Counter Case, p. 27. Appendix to British Case, vol. v, pp. 269, 270.

principles of international jurisprudence, and the absence of which constitutes negligence.[1]

Meaning of the words "reasonable ground to believe."

27. When it is said that a Government has reasonable grounds to believe that an act is intended, which act the Government, if it possess such reasonable grounds, is bound to endeavor to prevent, and can prevent only by the enforcement of a law, more is meant than that the Government has grounds for suspicion, founded on rumor or mere circumstances of probability. Such grounds as these may indeed determine a Government to undertake voluntarily the responsibility and risk of trying to enforce the law; but they cannot create an obligation. This can only arise when the Government has adequate grounds, not for suspicion only, but for belief, that is, for such a belief as is sufficient to justify it in setting the machinery of the law in motion.

"Due diligence."

28. Due diligence on the part of a Government signifies that measure of care which the Government is under an obligation to use for a given purpose. This measure, where it has not been defined by international usage or agreement, must be deduced from the nature of the obligation itself, and from those considerations of justice, equity, and general expediency on which the law of nations is founded.[2]

29. Where the substance of the obligation consists in the prevention of certain acts within the territory of a neutral power, from the consequences of which loss might arise to foreign States or their citizens, it would not be reasonable to exact, as of right, from the Government, a measure of care exceeding that which Governments are accustomed to exert in matters affecting their own security or that of their own citizens. No duty which nation owes to nation can possibly be higher or more imperative than that which every State owes to its own members, for whose welfare it exists, and to whom the Government, however constituted, is morally and primarily responsible for the right exercise of its powers.[3] An extract from the able Danish jurist, Tetens, bearing on manifestly just and reasonable principle, has been given in a note at page 23 of the British Counter Case.

30. An observation to the same effect as the foregoing in the Case of Great Britain has been excepted to in the Counter Case of the United States, on the ground that "it sets up as the measure of care a standard which fluctuates with each succeeding Government in the circuit of the globe.[4] This is an error. Where individuals are in question, the only general standards of due care which it has been found possible to frame, are framed with reference either to the care which the particular individual, against whom negligence is alleged, is accustomed to exert in his own concerns, or to the care which men in general, or particular classes of men, are accustomed to exert in their own concerns. To standards of this kind, with various modifications and under different forms of expression, jurists and judicial tribunals in all countries have commonly had recourse, to assist them to a decision in cases of alleged negligence. Where the acts or omissions of a Government are in question, it is certainly not unreasonable that the general standard of care, so far as any general standard is possible, should be drawn from the ordinary conduct of Governments in matters affecting those interests which they are primarily bound to protect. The objection suggested by the United States, that the standard is a fluctuating one, is therefore not only

[1] British Counter Case, p. 21.
[2] British Case, p. 24, proposition 9.
[3] British Case, p. 167. Counter Case of the United States, sec. ii, par. 3.
[4] British Case, p. 24, proposition 10. British Counter Case, pp. 21, 22.

erroneous in itself, but might with equal reason be urged against the principles of decision commonly applied to analogous cases in the administration of private law. Its tendency, if admitted, would be to introduce a universal hypothesis of absolute and arbitrary power, as the rule of judgment for all such international controversies.

31. Great Britain has, however, submitted to the arbitrators that the question, what measure of care is in a given case sufficient to constitute due diligence, cannot be defined with precision in the form of a general rule, but must be determined on a careful consideration of all the circumstances of the given case.[1] In the British Counter Case the history and experience of the United States themselves, during the war between Great Britain and France at the close of the last century, during the wars between Spain and Portugal and their revolted colonies, and still more recently in the cases of expeditions and hostile movements organized within the United States against Mexico, Cuba, and Great Britain, has been largely referred to, for the purpose of showing what has heretofore been deemed sufficient by the Government of the United States to satisfy the obligations incumbent upon them in this respect toward other nations, and how imperfect a measure of success has attended their efforts to restrain their citizens from lawless acts, inconsistent with those obligations.[2] The statements in the British Counter Case on this subject will be found to be corroborated by the papers appended to the Counter Case of the United States. Those papers show the various instructions and proclamations issued with the object of preventing violations of the American law. The British Counter Case shows how, for a long series of years, and also very recently, those instructions and proclamations have been successfully evaded. Mr. Seward, in his dispatch to Mr. Adams, dated the 2d March, 1863, thought it sufficient to express the desire and expectation of the President that Her Majesty's Government would "take the necessary measures to enforce the execution of the law as faithfully as his own Government had executed the corresponding statutes of the United States."[3] This is a test of due diligence, by which Her Majesty's Government might safely be content to have its conduct tried. It does not believe that upon any candid mind the comparison would leave an impression to the disadvantage of Great Britain.

32. It is absolutely necessary, in considering charges such as are made against Great Britain by the United States, to take into account, for some purposes, the laws and institutions of the nation charged, the powers with which its Government is invested, and its ordinary modes of administrative and judicial procedure. These are among the circumstances which bear on the question of negligence, and they have a most material bearing on it. In all civilized countries, the Government possesses such powers only as are conferred on it expressly or tacitly by law; the modes of ascertaining disputed facts are regulated by law; through these powers the Executive acts, and to these methods of inquiry it is bound to have regard. To exclude these from consideration in questions relating to the performance of international duties, would at once render such duties intolerable and their performance impossible.

British law, and powers of the Executive in Great Britain.

33. These considerations in no way affect the principle that the duties of neutrality are in themselves independent of municipal law. Those duties are not created by municipal law; they cannot be abolished or altered by it. But since, in the discharge of international

[1] British Counter Case, pp. 22, 125. [2] Ibid., pp. 25–47.
[3] Appendix to Case of the United States, vol. i, p. 669.

duties, every nation acts through its Government, and each Government is confined within the sphere of its legal powers, the local law and local institutions cannot be disregarded when the question arises, whether in a given case a Government had sufficient grounds of belief to proceed upon, and whether it acted with proper diligence.

34. It was, therefore, material to show what, at the time when the acts complained of by the United States are alleged to have been done, was the state of British law in relation to such matters; what powers the Executive Government possessed; in what modes those powers could be exercised; and what were the general rules of administrative and judicial procedure, including those relating to the judicial investigation of facts and the reception of evidence.

35. In reference to this part of the question the following propositions, already laid down on the part of Great Britain, may be repeated here:

In every country where the Executive is subject to the laws, foreign States have a right to expect—

(*a.*) That the laws be such as in the exercise of ordinary foresight might reasonably be deemed adequate for the repression of all acts which the Government is under an international obligation to repress, when properly informed of them;

(*b.*) That, so far as may be necessary for this purpose, the laws be enforced and the legal powers of the Government exercised.

But foreign States have not a right to require, where such laws exist, that the Executive should overstep them in a particular case, in order to prevent harm to foreign States or their citizens; nor that, in order to prevent harm to foreign States or their citizens, the Executive should act against the persons or property of individuals, unless upon evidence which would justify it in so acting if the interests to be protected were its own or those of its own citizens. Nor are the laws or the mode of judicial or administrative procedure which exist in one country to be applied as constituting a rule or standard of comparison for any other country. Thus, the rules which exist in Great Britain as to the admission and probative force of various kinds of testimony, the evidence necessary to be produced in certain cases, the questions proper to be tried by a jury, the functions of the Executive in regard to the prevention and prosecution of offenses, may differ, as the organization of the magistrature and the distribution of authority among central and local officers also differ, from those which exist in France, Germany, or Italy. Each of these countries has a right, as well in matters which concern foreign States or their citizens as in other matters, to administer and enforce its own laws in its own forum, and according to its own rules and modes of procedure; and foreign States cannot justly complain of this, unless it can be clearly shown that these rules and modes of procedure conflict in any particular with natural justice, or, in other words, with principles commonly acknowledged by civilized nations to be of universal obligation.[1]

36. It has been shown that the law of Great Britain, as it existed at the time of the civil war in the United States, was such as, in the exercise of ordinary foresight, might reasonably be deemed adequate for enabling the British Government to perform its obligations as a neutral Government. It was modeled upon the law of the United States, which had long existed and had frequently been brought under consideration in the courts of that country; it equaled that law and even surpassed it in stringency; and offenses against it (if any there were) had been so rare

[1] British Case, pp. 24, 25; see also British Counter Case, pp. 72, 73.

as to have left hardly any trace in the judicial records of Great Britain.[1]

Compared with the laws of other countries, which have been collected and placed before the Arbitrators, it will appear to have been (as it really was) singularly stringent in its prohibitions, and copious and particular in detail. But the question is not whether it was stricter or less strict than the laws of other countries, but whether it was such as might reasonably be deemed sufficient in the exercise of ordinary foresight. It is impossible to deny that it was such.

37. It appears to be suggested, on the part of the United States, that some defect or defects, which might not have been foreseen, in the law of Great Britain, was or were brought to light by the case of the Alabama, and that the law ought to have been amended in consequence of this discovery. The answer to this is that, as respects the Alabama herself, the question of the liability of Great Britain, on account of her departure from this country, must be tried on the facts as they existed at that time, and not upon any subsequent state of facts. In respect of the Alabama, Great Britain must be held to be liable (if at all) on the ground that her Government failed to prevent the departure of the Alabama, and not on the allegation that she did not afterward amend her law, and thus failed to arrest the Georgia or the Shenandoah. But, further, it has been already shown that the departure of those two vessels was in no respect due to any deficiency in the law. It is not only true that the law of Great Britain was then more stringent than that which existed at the time in the United States, and has ever since been, and now is, deemed sufficient in that country, and which, a year after the departure of the Alabama, (July 11, 1863,) was spoken of by Mr. Seward as "exactly similar to that of Great Britain;"[2] but it is also clear that, if the law of Great Britain had, in truth, been an exact copy of that of the United States, and had been interpreted and enforced in precisely the same way, no facts existed—much less were known to the British Government—which would have warranted the arrest of either of these latter vessels for a breach of that law.

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[1] British Case, pp. 29, 30.

[2] Appendix to Case of the United States, vol. i, p. 670.

For evidence as to the particulars in which the British law is more stringent than that of the United States, see the opinion of Mr. Bemis, quoted in Annex (B) to the British Counter Case, (p. 149.) In the Counter Case of the United States (section iii, par. 11) the attention of the Arbitrators is called to a dispatch from Sir Frederick Bruce, British Minister at Washington, as furnishing evidence of the superiority of the United States' statute over the British act. But the dispatch referred to nowhere mentions the British Foreign-Enlistment Act, nor does it attempt to make any comparison between the statutes of the two countries. The passage quoted in the Counter Case of the United States will be found, when taken in its entirety, to refer merely to the advantages possessed by the United States Government in proceeding against *vessels*, as contrasted with the comparative difficulty of proceedings under the same law directed against *persons*. "I may remark," writes Sir F. Bruce, "that the Government of the United States has considerable advantages in proceeding against vessels under the statute. They have, on the spot where the preparations are being made, the district attorney, a legal officer responsible to the Government, to whom the duty of investigation is committed. The libel is in the nature of a proceeding in admiralty *in rem*. It is decided by a judge conversant with international and maritime law, and without the intervention of a jury. The failure of the attempt to stop or punish the persons engaged in the expeditions against Cuba, and the suspension of the proceedings against the men who took part in the Fenian raids against the British provinces, in spite of the clearest evidence, shows the difficulty of enforcing the law when it has to be put in operation *in personam*, and when it is dependent on the verdict of a jury." (Appendix to Case of the United States, vol. iv, p. 182. Appendix to British Case, vol. iii. Report of Neutrality Laws Commission, p. 68.)

In Annex (A) at the end of this summary will be found a review of all the communications which passed during the war between the British and American Governments with reference to the state of the neutrality law of Great Britain.

38. Again, to the allegation that, on a particular point—the question whether a vessel specially adapted by construction for belligerent use, though not armed so as to be immediately capable of hostilities, was within the prohibitions of the Foreign-Enlistment Act—the provisions of the Act were regarded as of doubtful construction, and that in one case (that of the Alexandra) the doubt was resolved in the negative by a decision of a British Court, the members of which were equally divided in opinion about it, the answer (if any answer can be supposed to be necessary) is equally clear. The Act itself was, on this point, expressed in more stringent language than that of the United States; the legal advisers of the Government, and the Government itself on their advice, did not act on the laxer, but on the more severe, construction of it; the doubt referred to was never judicially raised till June, 1863, and it did not, in any case which afterwards occurred, operate to prevent the detention of any vessel which was intended to be employed in cruising or making war against the United States. It may be true that the law admitted of two different constructions on this point in England, as it certainly did in the United States; it may be true that it had, before 1863, been (to some, though only to a very limited, extent) judicially interpreted in the United States, whilst no case calling for a judical interpretation had occurred in England; but it is clearly impossible to contend that it must for that reason be considered to have been, before 1863, less stringent in England than in the United States, or to argue that because some officers of a particular Department of Government (that of the Customs) honestly understood it in the less stringent sense, this fact constituted a failure of international duty on the part of Great Britain.

39. It is, therefore, abundantly clear that no argument against Great Britain can be founded on any supposed defect in the Foreign-Enlistment Act.

40. As to the general powers of the Executive Government in Great Britain and the rules of procedure established there, the following statements have been made on her part to the Arbitrators.

(*a.*) The Executive cannot deprive any person, even temporarily, of the possession or enjoyment of property, nor subject him to bodily restraint, unless by virtue and in exercise of a power created and conferred on the Executive by law.

(*b.*) No person can be visited with a forfeiture of property, nor subjected to any penalty, unless for breach of a law, nor unless such breach is capable of being proved against him.

(*c.*) Under the Foreign-Enlistment Act the Government had no power to seize or detain a ship, unless with a view to subsequent condemnation in due course of law, and on the ground of an infringement of the law sufficient to warrant condemnation.

(*d.*) Before authorizing the condemnation of a suspected vessel, the law required that the facts alleged against her should be capable of proof. Open investigation before a Court is the mode appointed by law for sifting all allegations and distinguishing ascertainable facts from mere rumor. This is an ordeal which a British Government must always be prepared to encounter if, in the exercise of the powers intrusted to it, it seizes or interferes with the person or property of any one within its jurisdiction. The British Government, therefore, justly held itself entitled and bound, before seizing any vessel, either to have sufficient proof in its possession or to have reasonable grounds for believing that it would be forthcoming before the trial of the case should begin.

(*e.*) By proof, in an English court of law, is understood the produc-

tion of evidence sufficient to create in the mind of the judge or jury (as the case may be) a reasonable and deliberate belief of the truth of the fact to be proved, such as a reasonable person would be satisfied to act on in any important concerns of his own. And by evidence is understood the testimony, on oath, as to facts within his or their personal knowledge, of a witness or witnesses produced in open court and subject to cross-examination.[1]

41. It may well be true, and doubtless is so, that these rules of procedure, administrative and judicial, differ, more or less, from those which exist in some other countries; that the powers lodged in the Government in some of those countries are larger than in Great Britain; that an authority may exist elsewhere, which in Great Britain was absent, to act on mere suspicion; that the principles applied to the admission and the credibility of evidence may not be the same. But it is plainly impossible to contend that the rules established in Great Britain were in any respect contrary to natural justice or in conflict with any principles of public law generally recognized by civilized States, or so restrictive of the powers of Government as to disqualify it from the discharge of ordinary international duties. Their general principles do not, in fact, differ from those which have been inherited from the same original sources by the United States. Those principles are esteemed essential in Great Britain for the preservation of public and private liberty. The British Government was therefore entitled and bound to observe and act on the rules founded upon them; and no charge of negligence can be founded on, or supported by, the fact that it did so observe and act on them in respect of any of the vessels to which the claims of the United States relate.[2]

42. Taking into account these circumstances, and bearing in mind the principles of the decision which have been laid down, the Arbitrators have first to determine whether, in failing to prevent the fitting out, arming, or equipping, within Great Britain, or the departure from Great Britain after a special adaptation for war, of any of the vessels above mentioned, the British Government is, or is not, justly chargeable with a failure of duty for which Great Britain owes compensation to the United States.

Facts which must be proved before an award can be made against Great Britain.

43. Before an award can be made against Great Britain in respect of any vessel, the Arbitrators have to be satisfied—

(*a.*) That she was in fact fitted out, armed, equipped, or specially adapted, either wholly or in part, to warlike use within British territory;

[1] British Case, pp. 30, 51. British Counter Case, pp. 73, 81.

[2] The Counter Case of the United States contains (in section iii, par. 15) some observations on the explanations, given at page 57 of the British Case, of the meaning of the terms "registry" and "clearance," and of the duties of the officers of the Government charged with the registration and clearance of vessels in British ports. The United States invite the attention of the Tribunal to extracts of the British Merchant Shipping Act of 1854, and of the Customs Consolidation Act of 1853, as conferring, in their opinion, more extended powers upon the officers of the British Government than are stated in the British Case. The point is not one which is material to the questions at issue; the acts in question were designed exclusively for commercial and fiscal purposes, for the protection of the revenue and the proper regulation of British shipping, and their provisions could not be applied to the prevention of attempted or apprehended violations of neutrality, for which the necessary powers have been conferred by separate legislation in the Foreign-Enlistment Act. The statement made in the British Case was, however, perfectly correct; and although, for the reasons above mentioned, Her Majesty's Government thinks it unnecessary to enter into the matter in detail, it will be ready, should the Arbitrators so desire, to furnish a statement showing what has been the uniform practice of the branches of the Administration charged with the execution of these laws, and proving that that course was followed in the case of each of the vessels under discussion.

(*b.*) That the British Government had, before she was beyond their authority and jurisdiction, reasonable ground to believe that she was intended to cruise or carry on war against the United States;

(*c.*) And also that, having such reasonable ground of belief, the Government did not use due diligence to prevent her equipment as aforesaid, or else to prevent her departure.

44. For the purpose of determining these questions, the Arbitrators have to place themselves in the situation in which the British Government was at the time, and not to impute to it a knowledge of facts which it did not then actually possess, unless in any case it should be proved to the satisfaction of the Arbitrators that other facts must have been known to it, had it exerted reasonable care.

45. The case of the Florida was the first in order of time. No attempt on the part of the Confederate Government to fit out or procure a vessel of war within British territory had up to that time come to the knowledge of the British Government, or had in fact been made. No facts were known to the British Government proving or tending to prove that such an intention existed.

The Florida.

46. The material facts relative to this vessel are stated in the Case of Great Britain, Part V, in the Counter Case of Great Britain, Part VI, and in the documentary evidence therein respectively referred to.

47. As to her original departure from Great Britain and the circumstances which preceded it, the Arbitrators have seen—

(*a.*) That the first communication made to the British Government on the subject was received on the 19th February, 1862, three months after the attention of the United States Consul at Liverpool had been directed to her, and at a time when she was ready for sea;[1]

(*b.*) That, a fortnight before the date of this communication, it was known to Mr. Dudley and to Mr. Adams that she was taking in her coal, and appearances then indicated that she was about to sail before the end of that week. They made, however, no representation to the Government, which might have led the Government to institute inquiry;[2]

(*c.*) That, in the communication made on the 19th February, no proof whatever was furnished of the intended employment or true ownership of the vessel, and no circumstance stated which, even if it had been verified, could have produced more than a bare suspicion;[3]

(*d.*) That, vague and scanty as were the allegations in Mr. Adams's letter, inquiry was instantly directed by the Government. No information, however, could be obtained tending to connect the vessel in any way with the Confederate States. She was declared by the builder to be ordered for a firm at Palermo, a member of which, being a native of that city, was registered, on his own declaration, as her sole owner, and had frequently visited her when building.[4] She had on board no troops and no arms or military supplies. The contrary supposition, entertained at one time by the United States, was founded on a mere misunderstanding of blanks in a printed form of clearance.[5] Her first destination, as stated in her clearance, was Palermo; and her crew were nominally (and, as they evidently believed, really) hired for a mercantile voyage.[6] On the one hand were the positive statements of the builder, the regis-

[1] British Case, p. 53; British Counter Case, pp. 74, 75; Appendix to Case of the United States, vol. vi, p. 383.

[2] British Case, p. 53; Appendix to Case of the United States, vol. vi, p. 215.

[3] Appendix to British Case, vol. i, p. 1.

[4] British Case, pp. 54, 55; Appendix to British Case, vol. i, p. 10.

[5] British Case, pp. 56, 57; British Counter Case, p. 75; Appendix to British Case, vol. i, pp. 7, 8.

[6] British Case, pp. 58, 65; Appendix to British Case, vol. i, p. 161.

tered owner, and the collector of customs; on the other, the suspicion of Mr. Dudley that the vessel was still intended by her owner to pass, sooner or later, into the hands of the Confederate Government. But a suspicion is one thing, reasonable ground of belief another; and the British Government, while it would have been bound to act on a reasonable belief that there was a present fixed intention to employ her as a Confederate ship of war, was neither bound by international duty, nor empowered by its municipal law, to act on a bare suspicion that she might pass into that employment;[1]

(*e.*) That the results of this inquiry were communicated to Mr. Adams on the 26th February;[2] that more than three weeks elapsed from that time till the sailing of the ship; yet that, during the whole of that time, no further communication was made to the Government by the American Minister or Consul. Either they had no information, or, having information, they did not produce it. It appears from the contemporaneous correspondence of the Government of the United States with their agents at Liverpool, that this ship was in reality supposed by those agents to be one of a numerous class then fitting out at that port, of which the rest proved to be blockade-runners, intended and used for commercial and not for warlike purposes.[3]

48. It is stated in the Counter Case of the United States (sec. v, par. 5) that from the evidence furnished in the British Case and Appendix, "it appears clearly that before the Florida left Liverpool, the British Government received information from the Government of His Majesty the King of Italy, that the pretense that the Florida was constructed for the Italian Government was a fraud." This is an error. The Florida (then the Oreto) left Liverpool on the 22d of March.[4] At that time the only information received from the Italian Government was that conveyed in a telegram from the British Minister at Turin of the 1st March, to the effect that M. Ricasoli had no knowledge whatever of the ship Oreto, but would cause inquiry to be made.[5] The later announcement by M. Ratazzi that every inquiry had been made and that the Italian Government knew nothing of the vessel, was not made to the British Minister till the 25th of March, three days after the Florida had sailed from the Mersey.[6]

49. On these facts, the United States charge Great Britain with a failure of international duty, rendering her liable to make compensation for all losses subsequently occasioned by, or attributable to, the Florida, after she had been converted into a Confederate ship of war. The conversion took place about five months afterward; the cruise, in the course of which her prizes were made, commenced from a Confederate port, about ten months afterward. On the part of Great Britain it is submitted that this charge is without foundation; that it finds no support in any just or reasonable conception of international obligations hitherto recognized by other Powers; and that, were it to be sustained, no neutral State could be secure.

50. As to the subsequent departure of the Florida from Nassau, the Arbitrators have seen that this vessel, from the time when she entered the waters of the Colony, was watched by the local authorities;[7] that

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[1] British Counter Case, p. 75.
[2] British Case, p. 55; Appendix to British Case, vol. i, p. 3.
[3] Appendix to Case of the United States, vol. i, pp. 529, 649.
[4] British Case, p. 58; Appendix to British Case, vol. i, p. 7.
[5] Appendix to British Case, vol. i, p. 3.
[6] Ibid., vol. i, p. 6.
[7] British Case, pp. 61-63; Appendix to ditto, vol. i, pp. 12-23.

she was finally seized, on a charge of a violation of the Foreign-Enlistment Act;[1] that proceedings were, by the Governor's direction, instituted in the proper court, with a view to her condemnation; and that, after a fair and regular trial, she was ultimately released by a judicial sentence.[2] It is impossible, therefore, to contend that the departure of the Florida from Nassau was due to negligence on the part of the local authorities or of the Government of Great Britain; on the contrary, the authorities did what they could to prevent it. The United States have attempted to impute to the chief Law-Officer of the Government in the Colony unfaithfulness to his superiors, and dishonesty in the performance of his official duty. Personal charges of such a nature ought not to be made unless they are clearly relevant, nor unless they can be sustained by the clearest evidence. But they have been shown, on the contrary, to be destitute of any shadow of foundation.[3] The United States criticise also the ruling of the Judge on a doubtful point of law. A Government, however, is not to be charged with negligence because a court of competent jurisdiction may pronounce, on a matter of law or fact, properly submitted to it for decision, a questionable or even an erroneous judgment. The Executive has performed its duty when it has brought the case before a competent tribunal, and cannot afterward take it forcibly out of the control of the court, or refuse obedience to its decree. If this be true (as it is) in ordinary cases, it is still more clearly so when the whole transaction takes place in a remote colonial dependency.[4]

The Alabama.

51. The facts relative to the departure of the Alabama, and the circumstances which preceded it, are stated in the British Case, Part VI, and in the British Counter Case, Part VI.

52. It has been seen:

(*a.*) That this vessel was constructed by a large ship-building firm at Birkenhead, whose regular business included the building of ships of war for the British Government, and for foreign Governments or their agents, and who built her to order, purely as a commercial transaction, and without any knowledge as to the manner in which she was afterwards to be armed for war—believing, indeed, according to their own statements, that she was to be carried for that purpose into a Confederate port;[5]

(*b.*) That the first representation made on the subject was received on the 24th June, 1862;[6]

(*c.*) That, on the 25th June, the Government ordered inquiries to be made on the spot, and also referred the matter to the Law-Officers of the Crown;[7]

(*d.*) That inquiries were made accordingly, but failed to produce any evidence that she was intended for the Confederate Government or service;[8]

(*e.*) That, on the 4th July, the result of this inquiry was communi-

[1] British Case, p. 64; Appendix to ditto, vol. i, pp. 14, 27.
[2] British Case, pp. 64–66; Appendix to ditto, vol. i, pp. 38–52.
[3] British Counter Case, pp. 76–78; Appendix to British Case, vol. v, pp. 19–25.
[4] The United States have called attention in their Counter Case (section v, par. 3) to the fact that the success of the Florida in passing through the United States blockading squadron off Mobile was described by the Admiral in command as only a case of "*apparent* neglect." It is clear, however, that the Government of the United States did not so regard it, by the very severe sentence passed on the officer in fault, who was summarily dismissed from the service. (Appendix to British Case, vol. i, p. 73.)
[5] British Case, p. 117; British Counter Case, pp. 81, 86.
[6] British Case, p. 81; Appendix to ditto, vol. i, p. 177; British Counter Case, p. 82.
[7] British Case, p. 82; Appendix to ditto, vol. i, pp. 180, 181.
[8] British Case, p. 83; Appendix to ditto, vol. i, p. 182.

cated to Mr. Adams, with a suggestion that he should instruct "the United States Consul at Liverpool to submit to the Collector of Customs at that port such evidence as he might possess, tending to show that his suspicions as to the destination of the vessel were well founded.[1]

(*f.*) That, on the 10th July, a letter was received from the Consul, which furnished no evidence, and gave nothing but mere reports, received from anonymous persons, of statements alleged to have been made by others who could not be found, or who, if found, could not be compelled to testify, since their testimony would have tended to criminate themselves;[2]

(*g.*) That, on the 21st July, for the first time, some evidence was produced by the Consul to the Collector, but that it was scanty and imperfect;[3]

(*h.*) That some additional evidence was furnished on the 23d, and some again was received by the Board of Customs on the 25th;[4]

(*i.*) That on Tuesday, the 29th, the Law-Officers reported their opinion that the evidence was sufficient, and that the vessel ought to be seized.[5]

53. It has not been shown by the United States that, before the time when the first representation was made to the British Government, any circumstances proving or tending to prove that the vessel was intended for the service of the Confederate States were, or ought to have been, known to this Government or any of its officers.

54. It appears from the statements made on the part of the United States themselves, that, although she had been an object of suspicion to the United States Consul for more than six months, and although, within his knowledge, she had been gradually advancing to completion, had made her first trial trip, and had begun to get ready for sea, yet no evidence whatever proving, or tending to prove, that she was intended for the Confederate States was produced to the British Government or any of its officials till eight days before she actually sailed, and at a time when it was believed that she might depart at any hour; and that what was then furnished was so imperfect that it needed to be strengthened by additional evidence, part of which was delivered on the sixth, and other part on the fourth, day before her departure. It is clear then that up to the very eve of her sailing the American Minister and Consul either possessed no proof at all that she was intended for the Confederates, or, having such proof, did not disclose it.[6]

55. It may be proper here to notice the allegations made in the Case and Counter Case of the United States, that it would have been useless to make any representations to the British Government, because that Government required to be furnished with technical evidence of a violation of the law before it would act, and even before it would institute inquiry, and would listen to no representations which did not furnish such evidence; that "Her Majesty's Government declined to investigate charges and to examine evidence submitted by Mr. Adams as to repeated violations of British territory, which subsequent events proved were true in every respect;" and that an expression in a letter written by Earl Russell, in March, 1863, coupled with the division of opinion in the Court of Exchequer, respecting the case of the Alexandra, in January, 1864, was "an abandonment in advance of the obligation to use due diligence." All these assertions are erroneous. The British Gov-

[1] British Case, p. 84; Appendix to ditto, vol. i, p. 184.
[2] British Case, p. 84; Appendix to ditto, vol. i, p. 185; British Counter Case, p. 84.
[3] British Case, p. 87; Appendix to ditto, vol. i, p. 188; British Counter Case, p. 84.
[4] British Case, pp. 92–94; Appendix to ditto, vol. i, pp. 194–198.
[5] British Case, p. 95; Appendix to ditto, vol. i, p. 200.
British Counter Case, p. 85.

ernment did indeed require, as it had the right to do, before seizing a vessel, either to have in its possession what seems to be described by the United States as "technical" evidence, that is, evidence which could be publicly produced and tested before a judicial Tribunal, or else to have reasonable grounds for believing that such evidence would be forthcoming before the trial of the case should begin. But in no single case, from the beginning to the end of the war, did it refuse to listen to representations on the ground that they did not furnish such evidence, or refuse or forbear on that account to make any representation the subject of instant inquiry. The conduct of Mr. Adams in 1862 could not have been affected by circumstances which occurred in 1863 and 1864. Nor does it appear that those circumstances did in fact affect in any way, or at any time, either the conduct of Mr. Adams or that of the British government; since Mr. Adams continued, after the Alexandra case, as well as before it, to make representations to the Government in every case of suspicion, without producing "technical" evidence, and the Government continued in every case to investigate facts, and to detain vessels against which any proof could be obtained, on the same grounds as before.[1] Finally, it is clear that, in the Alabama case, Mr. Adams's representations were not deferred till he had obtained "technical" evidence, since they were made a month before he was able to produce any evidence at all; and the Government did not refuse inquiry till after evidence was furnished, since they directed and prosecuted inquiry more than three weeks *before* any was furnished.

56. It is possible that the "charges" and "evidence" submitted by Mr. Adams as to "repeated violations of British territory," to which the Government of the United States refers, may have reference to certain complaints as to the existence of Confederate Agents, the negotiation of pecuniary loans, and the purchase of supplies and munitions of war for the Confederate States in this country, and as to the trade in articles contraband of war and the fitting out of ships to run the blockade, which were, undoubtedly, from time to time, made by Mr. Adams. If such complaints were in any cases not investigated, it was because they manifestly related to acts not contrary to the law of Great Britain, and which Her Majesty's Government was under no obligation by Treaty or international law to prevent.

57. It has been clearly shown that, as regards the period which elapsed before the 21st of July, no pretense exists for imputing negligence to the British Government. Eight days after that date the vessel sailed, unarmed, and incapable of offense or defense. Within the interval written depositions to prove that she was intended for the Confederate Government were furnished in successive portions or installments to the British Government. That the question whether the evidence was credible and sufficient in law to sustain a seizure, was one on which the Government had a right, before acting, to consult its legal advisers, and to take reasonable time for consideration, is undeniable; and it has been shown that the depositions were, in fact, referred to the Law Officers as soon as they were received from time to time.

58. The United States allege in their Counter Case (Sec. VI, par. 1) that the official legal advisers of the Customs gave opinions on the evidence contained in Mr. Adams's representations, which were in conflict with the opinions of the Law Officers of the Crown; that these opinions were given upon the questions after they had been submitted to the Law Officers of the Crown, and before the latter had rendered their opin-

[1] British Case, pp. 31–46; British Counter Case, p. 81.

ions, and that the Customs Department acted on the opinions of their own advisers at a time when they must have known that the Law Officers of the Crown had the subject under consideration.

It cannot be admitted that this is an accurate representation of the facts as they occurred. The opinion of the legal advisers of the Customs upon the evidence furnished was, that it was insufficient to justify the seizure or detention of the ship by the Officers of Customs.[1] They recommended, however, that the opinion of the Law Officers of the Crown should be taken.[2] In the interval which elapsed before the opinion of the Law Officers was received, the Customs Department, as was natural and right, abstained from directing a seizure which they themselves considered would be unauthorized. As soon as the decision of the Government was communicated to them, immediate steps were taken for carrying it into effect.[3]

59. In the Counter Case of the United States, (Sec. VI, par. 3,) it is further stated that:

> It appears that the Commissioners of Customs knew on Tuesday, the 29th of July, that the Alabama had escaped that day, and that it was not until Friday, the 1st of August, that the Collectors at Holyhead and Beaumaris received instructions to detain her. On the 2d of August the Collector at Beaumaris reported that he had attended to his instructions, and had found that the Alabama had left Point Lynas on the morning of Thursday, the 31st. If, therefore, the instructions given on the 1st of August had been given on the 29th of July, the Alabama might have been detained at Point Lynas.

An examination of the facts, distances, and dates will show that such a course would have been nearly, if not quite, impossible.

The Commissioners of Customs received telegraphic information on the 29th of July that the vessel had left the port of Liverpool that morning.[4] The opinion of the Law Officers that the vessel should be seized had not at that time been received, nor was anything known as to her movements. The United States Consul at Liverpool appears to have been in doubt, even the next day, whether she had not gone out on a trial trip and would not return to Liverpool.[5]

On Wednesday, July 30, the Customs Department in London received a letter from the Solicitors employed by the United States Consul, in which they stated their belief that the vessel had gone to Queenstown.

On the same morning, the United States Consul at Liverpool received information that the steam-tug Hercules, which had accompanied the Alabama, had returned the night before, and that the master reported the gun-boat to be cruising off Point Lynas. This information Mr. Dudley communicated to the Collector of Customs at Liverpool, in a letter which seems to have been received at about 1 p. m. the same day.[6]

This was the first information pointing to the vicinity of Point Lynas as the place where the vessel might be found. Point Lynas is situated on the northern coast of the Island of Anglesea, about fifty miles from Liverpool, and more than two hundred miles from Queenstown. The nearest custom-house stations are Beaumaris and Holyhead, from which it is distant in a direct line about fourteen and sixteen miles respectively, but much more by road.[7]

Supposing, therefore, that the Customs Collector at Liverpool had been at the time aware that the Government had decided on the seizure of the vessel, and that he had telegraphed the rumor of her movements up to London on the afternoon of the 30th of July, this would have been

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[1] Appendix to British Case, vol. i, p. 193.
[2] Ibid, p. 197.
[3] Ibid, p. 205.
[4] Ibid., p. 200.
[5] Ibid., p. 249.
[6] Ibid., pp. 204, 249.
[7] See map opposite.

the earliest moment at which instructions could have been sent to the Collector of Customs at Beaumaris to look out for the vessel off Point Lynas. The Collector would then have proceeded to the coast-guard station at Amlwch, and from thence to Point Lynas, to make inquiries; but supposing all possible dispatch to have been used, it is still doubtful whether he could have succeeded in arresting the Alabama, which was at Moelfra Bay, five miles away, and which left at 3 o'clock on the morning of the 31st.[1] He would have had, moreover, nothing but a coast-guard boat at his disposal. The crew of the vessel appear to have been on the lookout,[2] and she might without difficulty have steamed away on his approach.

60. The charge brought by the United States against Great Britain of a failure of duty in respect of the departure of the Alabama really reduces itself to this: that, in the interval between the 21st and 29th July, during which the evidence was coming in, the British Government took a little more time to satisfy itself that there was ground sufficient to warrant a seizure than the United States think was necessary. On this ground, in reality, the United States found their claim that all the losses caused by the Alabama, after she had been armed in Portuguese waters and converted into a Confederate ship of war, should be paid by Great Britain.

61. On the part of Great Britain it is submitted, that to rest such a claim on such a complaint, the complaint itself being supported by so slight and at the best so doubtful a foundation, is to assume a standard of international obligation which was never before acknowledged by any Government, and could not with safety or justice be conceded. It demands that the conduct of a Government, with its various departments, with modes of action which are of necessity complex and more or less methodical, shall always proceed with a mechanical precision which is inapplicable to the practical business of life. It makes no allowance for reasonable doubts, for the importance of careful deliberation when difficult questions of law are involved, for accidental delays occasioned by illness or other causes, or for the casual impediments which are liable to occur in matters of administration. The establishment of such a standard would be neither reasonable nor just, and would be of serious consequence, not to maritime States alone, nor in questions relating to neutrality only, but to the general peace and tranquillity of nations. It will be remembered that one cause of some delay in this case has always been understood to have been the illness of the then Queen's Advocate.[3]

62. Further, if it should appear (which Great Britain does not admit) that, through the fault or mistake of any subordinate official of the Government, either before or after the sailing of the Alabama from Liverpool, a chance or possibility of detaining her was let slip without the knowledge of the Government, this again cannot be held to afford a foundation for charging Great Britain, as against the United States, with a failure of duty and a grave international injury.[4]

63. It has already been observed that an equitable judgment as to all these points must be formed with reference to the facts as they were known at the time, and not as varied or affected by subsequent information or subsequent events. Mr. Adams made a contemporan-

[1] Appendix to British Case, vol. i. p. 207.

[2] It is stated in the report of the Customs Collector at Beaumaris, that they would not allow a boat from the shore to come alongside. (Appendix to British Case, vol. i. p. 207.)

[3] British Case, p. 118; Appendix to ditto, vol. i. p. 249; British Counter Case, p. 85.

[4] British Counter Case, p. 87.

eous report of the facts as to the Alabama to his Government upon the 1st August, 1861,[1] and on the 13th August the President desired Mr. Adams to express to Earl Russell his satisfaction at the "just and friendly proceedings and language of the British Government" with respect both to the Oreto and the Alabama.[2] No subsequent departure from this tone can alter the fact that this was the original impression produced upon the mind of the American Government by the circumstances which had occurred down to the 1st August, 1861, as they were known to Mr. Adams on that day.

64. The facts relative to the Georgia are stated in Part VII of the British Case, and in Part VII of the British Counter Case. The Georgia.

65. In the case of the Georgia no information or representation whatever was given or made to the British Government until six days after the ship had put to sea. Information about her had for a long time before (according to the statement of the United States) been in the possession of the American Minister and Consular officers, but they had not communicated it.[3] If what they knew furnished reasonable ground to believe that she was a vessel of an unlawful character, intended for the naval service of the Confederate States, they ought to have communicated it, and are themselves the persons to blame; if not, the necessary conclusion is, that the industry of these officials had failed to discover any information of that kind. Even the statements at last made by Mr. Adams were erroneous, as well as unsupported by any proof.

66. That there was nothing about the vessel herself, or her equipment, which could make it the duty of the Government to seize her, or even to institute inquiries about her, nor anything which ought to have excited the suspicions of the officers of the Revenue, is clear. She was, to all appearance, a vessel intended for commerce; and her build, rig, and fittings, her register, her clearance, her professed destination, the manner in which her crew were hired, and the terms of hiring, were all perfectly consistent with her apparent character and employment.[4] There is not, at this moment, any evidence whatever that she had been specially adapted for warlike use, either wholly or in part, before she left this country.

67. The intelligence of the departure of the Georgia from the Clyde, when first furnished by Mr. Adams to the British Government, together with the assertion (a bare assertion unsupported by any proof) that she was intended for the Confederate service, was accompanied by a statement that "her immediate destination is Alderney, where she may probably be at this moment." One of Her Majesty's ships of war was sent to Alderney in consequence of this statement, but it proved to be erroneous.[5] The Georgia did not go to Alderney, but proceeded to

[1] Appendix to Case of the United States, vol. iii. p. 35, vol. vi, p. 414

[2] Ibid., vol. i, p. 541.

[3] British Case, p. 120; Appendix to ditto, vol. i, p. 399; British Counter Case, p. 90; Appendix to Case of the United States, vol ii, pp. 665, 667.

[4] British Case, p. 122; Appendix to ditto, vol. i, pp. 404, 413; British Counter Case, p. 89; Appendix to Case of the United States, vol. vi, p. 512.

[5] Appendix to British Case, vol. i, p. 418. It is remarked in the Counter Case of the United States (sec. vii, par. 3) that "it appears that orders were given to a British vessel of war to proceed to Alderney; but it does not appear whether those orders were or were not obeyed." Her Majesty's Government did not think it desirable to add to the already voluminous correspondence laid before the Arbitrators by the insertion of documents which were not absolutely necessary. It might be taken for granted, and it is of course the fact, that the captain of Her Majesty's ship Dasher obeyed his instructions, and it was equally certain that he could obtain no intelligence at Alderney of either the Alar or Japan, both of which vessels were afterward found to have gone not to Alderney but to Ushant. The dispatch from the Governor of Alderney reporting the unsuccessful result of the mission of the Dasher is, however, at the disposal of the Arbitrators if they should desire its production.

French waters, where she received her armament. It is suggested, on the part of the United States, that it was the duty of the British Government to employ its naval forces in searching for and pursuing her on the high seas. No such duty exists, or has ever been recognized by maritime powers. It appears further to be suggested that she ought to have been pursued and seized in French waters. So far was this from being the duty of the British Government that it would have been a violation of the territorial sovereignty of France and a direct offense against the law of nations.[1] Her Majesty's Government is not aware that any claim has ever been made upon France by the United States, on the ground that this vessel was not prevented from being armed for war within the territorial jurisdiction of that country.

The Shenandoah.

68. The facts relative to the Shenandoah are stated in Part VIII of the British Case, and in Part VII of the British Counter Case.

69. The Shenandoah was a vessel designed and built solely for a merchant-steamer, and with a view to employment in the China trade; was originally employed in that trade; was afterwards sold in the London market to a Liverpool ship-owner; and was by him dispatched from London with a clearance for Bombay. At the time when she left England she was in no way fitted out, armed, or equipped for war. She had on board two smooth-bore, 12-pounder guns, but they were only the same guns which she had carried during her mercantile employment, and such as are usually carried by ships trading in the China seas, to be used as signal-guns, and for other purposes common to merchant-vessels.[2]

70. No representation was made, no information whatever was given to, or possessed by, the British Government, respecting this ship before her departure from England. The Government first heard of her five weeks after she had sailed, and then not from the Minister or Consul of the United States, but from Her Majesty's Consul at Teneriffe.[3]

71. There is not the slightest pretense for alleging that, in the character and appearance of the vessel, in her fittings or equipment, in her clearance, or in the hiring of her crew, there was anything whatever to excite suspicion in the officers of the Government at the port of London or elsewhere, or to lead to inquiry; nor that she had been, in fact, specially adapted to warlike use, either wholly or in part, before her final departure from this country. It has indeed been suggested, on the part of the United States, that the British Government ought to have known the name of the English merchant by whom she had been bought and was owned when she left England, and the circumstance that he was a connection by marriage of a member of the Liverpool firm of Fraser, Trenholm and Co.; and that it was a proof of a want of "the most ordinary diligence," on the part of Her Majesty's Government, not to be acquainted with and "take notice of" this circumstance.[4] On the part of Great Britain, it is not thought necessary to trouble the Arbitrators with any argument in answer to this remarkable suggestion.

72. In the case of the Shenandoah, as in that of the Georgia, the United States seek to hold Great Britain liable for negligence in not having prevented the equipment or departure of a vessel which was never fitted out, armed, or equipped for war in British territory, and was never specially adapted therein for warlike use; as to which no

[1] British Counter Case, pp. 90, 91.

[2] British Case, p. 143; Appendix to ditto, vol. i, pp. 481, 494-97, 724, 725; British Counter Case, p. 93.

[3] British Case, p. 136; Appendix to ditto, vol. i, p. 477.

[4] Case of the United States, p. 417.

representation or communication had been made to the Government, and no ground whatever existed for believing that she was intended for the Confederate States; which presented no circumstance of suspicion, and of the very existence of which the Government was totally uninformed. These pretensions are unsupported alike by the three Rules, and by the previously recognized principles of international law.

Conclusion as to the Florida, Alabama, Georgia, and Shenandoah.

73. It is submitted that, as to every one of these four ships, the United States have failed to establish the facts necessary to support an award against Great Britain. It has not been, and cannot be, shown, in the case of any one of them, that the British Government, having reasonable ground to believe that she was intended to cruise and carry on war against the United States, failed to use due diligence to prevent her from being fitted out, armed, or equipped for that purpose within British territory, or from departing thence, after having been specially adapted within it to warlike use.

General course pursued by the British Government in regard to the representations of Mr. Adams.

74. It was stated in the case of Great Britain that, in the course of the years 1861, 1862, 1863, 1864, and 1865, many representations were addressed by Mr. Adams to Her Majesty's Government respecting vessels which he believed to be either actually employed in carrying on trade with blockaded ports in articles contraband of war or other things, or to be preparing for such employment; and also with respect to other vessels which he believed to be intended to be used as privateers or commissioned ships of the Confederate States in cruising and carrying on war against the United States. To complaints of traffic carried on with blockaded ports, or in articles contraband of war, it was answered, on the part of Her Majesty's Government, that these were enterprises which Her Majesty's Government could not undertake to prevent, and the repression of which belonged to the United States as a belligerent Power. Allegations, on the other hand, that vessels were being prepared for cruising or carrying on war were immediately referred to the proper officers of the Government at the several localities for careful investigation and inquiry. If, on such investigation, it appeared by sufficient *prima-facie* evidence that any illegal act was being or had been committed, the vessels were forthwith seized, and proceedings instituted according to law; if not, the result was at once communicated to Mr. Adams, and directions were given to the local authorities to watch closely the vessels as to which his suspicions had been aroused.[1]

It is said, in the Counter Case of the United States, (Sec. III, par. 14,) that "the United States do not understand that it is true that 'allegations that vessels were being prepared for cruising or carrying on war' were in all cases followed by seizure of the vessels when sufficient *prima-facie* evidence of the illegal purpose was furnished. They understand the exact contrary to be the case."

The general course pursued by the British Government in these matters is correctly described in the foregoing extract from the British Case The United States question whether, "*in all cases*," this course was adhered to. Even with this addition, however, the proposition questioned is true, excluding only the case of the Alabama, in which some evidence sufficient to justify action on the part of the Government was indeed furnished, but furnished so late that the departure of the vessel took place before the Government had been advised to that effect.

Charge that the armament of certain vessels was procured from Great Britain.

75. It is, however, alleged, on the part of the United States, that each of these four vessels, if not actually armed and equipped for war within British territory, obtained her armament from thence; that this armament was in each case purchased and

[1] British Case, pp. 31, 32.

sent out by the same person or persons who had procured and sent out the ship; that such person or persons was or were an agent or agents of the Government of the Confederate States, employed for these purposes; and that the crews with which the vessels were manned were chiefly composed of British subjects, obtained from England by the same agency. And it is contended that, under these circumstances, the Tribunal ought, as against Great Britain, to assume that these vessels were really armed and fitted out within British territory, and to make its award on that assumption.

76. To assume, under any circumstances, that vessels armed in the waters of Portugal or France were armed in Great Britain, is to assume a fiction; and to base an argument or award on this assumption, would be to base an argument or award upon a fiction. International duties and liabilities cannot be made to repose on such a foundation. If it be meant to affirm that a neutral Government is as much bound to prevent arms from being sent abroad for this purpose and under these circumstances, as to prevent the actual arming of a belligerent vessel of war within the neutral jurisdiction, where is the proof of this supposed obligation, and when was it sanctioned by the general consent of nations? It is perfectly unknown, and was never heard of before. The acts, which are supposed to be virtually the same, and which the neutral Government is on that account supposed to be under the same obligation to prohibit, are in reality different, and the reasons which support the international obligation in the one case are wanting in the other. To attempt to found such an obligation on the second of the three Rules, which prohibits, in language previously familiar to publicists, the use of neutral territory, by the permission or with the acquiescence of the neutral Sovereign, as a base of naval operations, or for the *renewal or augmentation* of military supplies or arms, would be clearly indefensible. Upon the manner in which the phrase "base of operations," and other similar expressions, have been from time to time applied to subjects not within their proper meaning in the diplomatic correspondence of the American Government, some observations will be made hereafter; in this place it is sufficient to point out that the sending abroad of munitions of war which are intended to be used in arming a particular ship, is not the same thing, and does not involve the same hostile use of neutral territory, as the placing of the same armament on board of the belligerent vessel in the port of the neutral country, from whence she is to sail when so armed; nor is it, like the latter, comparatively easy of repression without an unreasonable interference with neutral trade. How indeed is the neutral Government to know the destination of the arms, or for what market or vessel they are intended? This is a matter into which neutral Governments have never been held bound to inquire, and would certainly never undertake to inquire. Does the supposed obligation in respect of the export of arms arise when ship and arms are procured from different countries, or only when they are obtained from the same country?—when from different ports, or only when from the same port?—when purchased by different agents, or only when the agent is the same? Where is the line to be drawn, and is it to be the duty of the neutral Government to search out all these various circumstances, or how many of them; and how is it to do so? Little consideration is needed to show that, although the several acts, by which a ship, and the armament which is to be put on board of her, are separately procured and sent abroad, may, as against the persons by whom or by whose orders they are done, be regarded as so many steps in the execution of a single enterprise, and parts of one transaction, they can-

not with justice be so regarded as against the neutral Government, which (so far as it can deal with them at all in the way of prevention) can only deal with them separately, and which may, and most frequently would, be wholly ignorant of the existence of the plan that was their sole connecting link, or at any rate unable to substantiate it. For the acts done beyond its territorial jurisdiction, whether by neutral citizens, or by belligerents with their aid, the neutral State cannot be held responsible.[1]

77. The facts relative to the arming of the several vessels now in question have been stated in the Case and Counter Case of Great Britain, and they will be found to illustrate the truth of the foregoing propositions.

78. The Alabama departed from Great Britain wholly unarmed,[2] and appears to have been equipped for war in the waters of the Azores, or partly in those waters and partly on the high seas, receiving her armament from two vessels which sailed respectively at different times from Liverpool and from London, without any apparent, known, or suspected connection with her. One of these, the Agrippina, cleared in the month of August from the port of London for Demerara; the other, the Bahama, cleared from Liverpool on the 11th of the same month for Nassau.[3] There is nothing, so far as the British Government is aware, to distinguish these two vessels from others freighted with munitions of war, which might be destined for places in the Confederate States, or to attract the special attention of the officers of customs at the several ports.[4] No information ever reached the British Government which could lead to the belief that they were employed to carry arms to a ship intended for the war service of the Confederate States, or for any purpose which the British Government could be called upon to prevent.

79. The Georgia, which also left Great Britain unarmed, received her armament in French waters from the Alar, a small steamer, which was stated to be a regular trader between the port of Newhaven in Sussex, on the British Channel, and the Channel Islands.[5] The Alar sailed from Newhaven with a regular clearance for Alderney and St. Malo. It sub-

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[1] See correspondence between the United States and Portugal: Mr. J. Q. Adams to the Chevalier de Serra, March 14, 1818, and September 30, 1820, (Appendix to British Case, vol. iii, pp. 150, 157.)

[2] British Case, p. 97; Appendix to ditto, vol. i, p. 205.

[3] British Case, pp. 100–104; Appendix to ditto, vol. i, pp. 208–213.

[4] Among the papers laid before Congress by the Government of the United States, and now also printed in vol. i of the Appendix to the British Case, (p. 252,) are two dispatches from Mr. Dudley, the United States consul at Liverpool, to his Government. The first of these, dated August 12, 1862, states that he "understands that Laird's gunboat 290 is somewhere either on the coast of England or Ireland, and that they are shipping to-day fifty more men who are to be taken to her to-night on a steamer." In the second, dated the following day, he reports that the men were placed on board the Bahama, which, after shipping them, and cannon, shot, and ammunition, had left her dock at 3 o'clock that morning, and was no longer to be seen. She had, in fact, sailed to meet the Alabama, which was, at that time, not off the coast of England or Ireland, as supposed by Mr. Dudley, but at Terceira, in the Azores, (see affidavits of Redden and Yonge, Appendix to British Case, vol. i, pp. 210, 220.) There appears no reason to believe that Mr. Dudley, before the sailing of the Bahama, knew or supposed that she was intended to carry out men or arms for the Alabama; nor, though he states that he had (apparently on the 13th, after her departure) written all the particulars to Mr. Adams in London, and to the United States consul at Dublin, was any representation made or information given to the British authorities either in London or Liverpool on the subject. The first information received by Her Majesty's government of the armament of the Alabama off Terceira was derived from a report of the customs officials at Liverpool, dated the 3d September following, on the return of the Bahama to that port. (Appendix to British Case, vol. i, p. 208.)

[5] British Case, pp. 121–128; Appendix to ditto, vol. i, pp. 401–418.

sequently appeared that, about two hours before her departure, (which occurred at 2 o'clock in the morning,) a number of persons, some of whom appeared to be seamen and some mechanics, had arrived by railway, and gone on board of her. On the day following that on which she sailed, the agent for the steamer told the collector of customs that she had munitions of war on board.[1] At the time of her departure, there was nothing whatever to connect her with the Georgia, which had sailed three days before, under her original name of the Japan, from Greenock, for Point de Galle and Hong-Kong, and of which nothing was known to the customs officers at Newhaven or to the Government; nor does there appear to have been anything which would have warranted the customs officers in detaining or interfering with the Alar. No information had been received, nor was there any fact within the knowledge of the Government or their officers, until she had already sailed, indicative of anything hostile to the United States in her employment or destination.

80. The Shenandoah, which likewise sailed from England without armament, took it on board in Portuguese waters, near to the Madeira Islands.[2] The steamer Laurel, by which it was conveyed thither, had sailed from Liverpool with a regular clearance for Nassau and Matamoras.[3] There was nothing whatever to connect her with the Shenandoah, which had sailed on the previous day from the port of London for Bombay, under her original name of the Sea King, and of which nothing was or could be known to the customs officers at Liverpool, nor to the Government. It appears that some suspicion had been excited in the mind of the United States consul at Liverpool as to the Laurel; but the suspicion was that she was intended to become a Confederate cruiser or privateer.[4] He had, as he said himself, no evidence, and he made no representation to any officer of the Government. Nor does there appear to have been any ground of belief or suspicion which would have warranted the customs officers in detaining or interfering with her. Of her real errand nothing whatever was known, until the receipt of intelligence from the British consul at Teneriffe. Her Majesty's Government is not aware that any claim has ever been made by the United States against Portugal, on the ground that the Shenandoah was converted into a ship of war within Portuguese territory.

81. The Florida is the only vessel of which it is alleged that she was armed in British waters. The circumstances stated on this head in certain affidavits, which, more than two years afterward, were for the first time produced by the United States,[5] and which the British Government has no means of verifying or disproving, were as follows: That before the Florida (then known as the Oreto) sailed from Nassau—which she did after having cleared as a merchant-steamer, and with a very small crew, hired in the port—a schooner called the Prince Alfred had put to sea, apparently with the design of running the blockade, and freighted with some guns and ammunition as cargo. There was nothing whatever to connect her with the Oreto, which was then lying in the harbor, after having been released by the judge of the proper court from seizure under the charge previously made against her, but not substantiated, of violating the Foreign-Enlistment Act. There does not appear to have been any circumstance within the knowledge of the local authorities to direct special attention to the cargo of the Prince Alfred, to disclose her errand, or to furnish a reason for detaining her. No com-

[1] British Case, p. 123; Appendix to ditto, vol. i, p. 405.
[2] British Case, pp. 136–141; Appendix to ditto, vol. i, pp. 477–490.
[3] Appendix to British Case, vol. i, pp. 492, 493.
[4] Appendix to Case of United States, vol. vi, p. 556.
[5] British Case, p. 67; Appendix to ditto, vol. i, p. 85.

plaint or representation respecting her seems to have been made by the consul of the United States at the time, nor until about a month afterward.[1] It is stated that while at sea she was overhauled by the Oreto, (or Florida,) and that the two vessels then proceeded to Green Cay, where the cargo of the Prince Alfred was transferred to the Florida. If this was so, it was certainly a violation of British territory by both vessels. But it was a violation which furnished no proof of negligence on the part of the local authorities, still less of the British Government, which was the party wronged and not the wrong-doer. Green Cay is a small island at a considerable distance from Nassau, uninhabited, and visited only by fishermen.[2] Violations of neutral territory committed by a belligerent in remote and unfrequented places, where no effective control can be exercised, were never before imputed to a neutral Government, as permitted or allowed by it in breach of its obligations toward the other belligerent. Over such a dominion as the Bahamas—which consist of several hundred islands, scattered over a wide surface, most of them desolate and uninhabited, and some merely small rocks or islets—no Government in the world could reasonably be expected to exercise such a control as to prevent the possibility that acts of this kind might be furtively done in some part of its shores or waters.

82. It is suggested, on the part of the United States, that the arms finally put on board of the Florida had previously been transported to Nassau from Hartlepool in the steamer Bahama. No evidence of this is produced by the United States. But, if it were true, the facts placed before the arbitrators by the United States themselves clearly prove, that the purpose, to which the Bahama's cargo was intended to be applied, was unknown alike to the British government and to the officials of the United States in England. By the latter it was believed to be destined for a confederate port, and intended to run the blockade.[3] The Florida herself did, in fact, go into and re-issue from a confederate port before she began to cruise against the shipping of the United States.[4]

83. It has thus been made clear that all the arms and munitions of war which were sent from ports within the Queen's dominions, in order to be used in arming confederate vessels, were shipped as in the ordinary course of commerce; that the purpose to which it was intended that they should be applied was not known to the British Government or its officers; that they had no means of knowing, and no reason even to suspect it. Hence, if it were possible to suppose that any obligation to prevent the shipment of cargoes destined for such a purpose was incumbent on a neutral Government, there would be no just ground for imputing negligence on that score to the Government of Great Britain. But no such obligation in fact existed; and the facts above stated appear to show that the effectual discharge of any such obligation would ordinarily be impossible to a neutral Government, unless by the total and indiscriminate prohibition of the export of arms and munitions of war. The second rule of the treaty of Washington is directed, not against proceedings of this kind, but against the use of neutral territory as a base of operations for naval warfare, or for the renewal or augmentation of military supplies or arms to ships employed, or intended to be employed, in the war-service of a belligerent, with the consent, or by the sufferance, of the neutral Government.

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[1] Appendix to British Case, vol. i, p. 87.

[2] Ibid., vol. i, p. 90; vol. v, p. 20.

[3] British Counter Case, p. 74; Appendix to Case of the United States, vol. vi, pp. 222, 223.

[4] British Case, p. 67; Appendix to ditto, vol. i, p. 73; Case of the United States, p. 350; Appendix to ditto, vol. iv, p. 458.

84. The tribunal may be here reminded that even the fact that any particular vessel was freighted with arms and munitions of war would not of necessity be known to the officers of the customs before her departure, and would probably be unknown to them if the parties concerned in the shipment had any motive whatever for not disclosing it. Unless where an exemption was claimed from customs duties otherwise payable, or a remission of import duties already paid, the law did not require that any statement or specification of the particulars of any cargo should be furnished to the officers of the revenue before the sailing of a ship. The specifications, being required only for the compilation of the statistical returns from the various ports, might be furnished at any time within six days after clearance. Nor were there any means of ascertaining, otherwise than by the statement of the master or owner, to what port a vessel was destined, or of guarding against the contingency that, having cleared for a specified destination, she might change her course when at sea.[1]

Charge that the crews of certain vessels were partly composed of British subjects.

85. It is suggested, on the part of the United States, that the crews of all or some of these four vessels were in part composed of British subjects. If that fact could be proved, it would not impose any liability on Great Britain. If, indeed, the British government had given permission to one of the belligerents to enlist men in Great Britain, for either its military or naval service, this might have given just ground for remonstrance and complaint to the other belligerent, especially if the latter were refused a like privilege. But it is not pretended that anything of this kind occurred. If, again, a vessel of war of either belligerent had been suffered, by connivance or acquiescence on the part of the authorities of a British port, to increase her strength in the port by adding to her complement of men, this would undoubtedly have been a proper subject of complaint under the general principles of international law, as well as under the second of the three rules. But nothing of this kind has been proved. It may be assumed to be true that, in the cases of the Alabama and Georgia, a considerable number of seamen were induced to leave England with an intention, on the part of the persons who induced them to go, that they should afterward be solicited to enlist in the naval service of the Confederate States, and that many of these did afterward enlist in that service; and it may probably be true that some of them knew or suspected that they would be invited to do so. But the facts show that (unless, perhaps, in one or two individual cases) no proposal to take service under the Confederate Government was made to them until they were at a distance from England; that persuasion was then used to induce them to join, by promises of high pay and prize-money; that some consented and others refused; that the latter were sent home, and the former signed fresh articles and entered into a new engagement and a new service. In every case the same course appears to have been pursued. Sailors were hired in England for an ordinary mercantile voyage, in the hope that they might afterward be won over, when at sea, by large promises, and by appeals, which it might well be thought would not be addressed in vain to men of careless, roving, adventurous habits. In fact, however, this expectation was in no small measure disappointed. The crew who went out on board the Oreto (afterward the Florida) lodged complaints before a magistrate at Nassau, on the ground that there had been a deviation from the voyage for which they were hired; they thus obtained their discharge from the ship, and a fresh crew were afterward hired at Nassau, who refused to sail because they had doubts

[1] See British Case, p. 57.

about her real character and intended employment.[1] The crew by which she was manned during her cruise was hired at Mobile.[2] With respect to the crew of the Alabama, it appears from Clarence Yonge's affidavits, produced on the part of the United States, that, after the vessel had put to sea, he was directed to "circulate freely" among them and "induce them to go on the vessel" after she should get to Terceira.[3] Many men when, after arriving at Terceira the new proposal to join was actually made to them refused, and were sent back to England.[4] Of the seamen who went on board of the Japan (afterward the Georgia) and the Alar, a considerable proportion—twenty-four at the least—refused in like manner to join the confederate service, when invited to do so, the vessels being then in French waters.[5] Of the crew of the Sea King (afterwards the Shenandoah) only three or four yielded; and these, it was stated, were under the influence of liquor. Forty-two refused, although tempted by the most profuse offers and far from home.[6]

86. It is clear that acts and contrivances of this kind on the part of a belligerent, although the netral power may regard them as injurious to itself, and as tending to endanger its friendly relations with the other belligerent, do not, even when partially successful, give to the latter any claim against the neutral.

87. It came to the knowledge of the British Government during the civil war that endeavors were being made to induce British subjects to go in considerable numbers to the United States, nominally to be employed in making railways or other works of a like kind, but really with the intention that, when there, they should enlist in the United States Army. Her Majesty's Government does not attribute these endeavors to the Government of the United States, nor hold that Government responsible for them. They were made, however, and they partially succeeded, as was known to and admitted by the Government of the United States.[7]

88. Efforts have been made, on the part of the United States, to prove that the Shenandoah was enabled to ship a considerable addition to her crew at Melbourne by the connivance or culpable negligence of the colonial authorities. This charge is one which, from its nature, would require to be supported by the clearest evidence. But it has not been so substantiated; on the contrary, it is disproved by the facts.

The accusations on this head, contained in the Case of the United States, have already been answered in detail in the British Counter Case, (pages 94–100,) to which Her Majesty's government would refer the Tribunal as affording also a sufficient reply to the further observations contained in the Counter Case of the United States. The physical obstacles which delayed the repairs of the Shenandoah have been fully

[1] British Case, p. 65; Appendix to ditto, vol. i, pp. 46, 49; Appendix to Case of the United States, vol. vi, p. 264.

[2] British Case, pp. 67, 78; Appendix to ditto, vol. i, pp. 116–125; British Counter Case, p. 79.

[3] Appendix to British Case, vol. i, p. 220; vol. ii, p. 221; Appendix to Case of United States, vol. vi, pp. 432, 438.

[4] See Redden's affidavit; Appendix to British Case, vol. i, p. 210; Appendix to Case of the United States, vol. vi, p. 423.

[5] See Affidavits of Thompson and Mahon; Appendix to British Case, vol. i, pp. 412–415; Appendix to Case of the United States, vol. vi, pp. 511–515.

[6] British Case, pp. 136–141; Appendix to ditto, vol. i, pp. 477–481, 485–490; Appendix to Case of the United States, vol. vi, pp. 566–571.

[7] Appendix to Case of the United States, vol. i, pp. 270, 281, 533, 590; vol. ii, pp. 406, 460; vol. iv, p. 248.

explained[1], and the peculiar difficulties under which the Colonial authorities labored, from the absence of any British vessel of war, and the impossibility of exercising an efficient control over the shipment of men from different parts of the Bay. On the other hand, the active vigilance enjoined upon and exercised by the authorities, the examination of the vessel by Government officers before permission to repair was given, the daily reports furnished to the Governor of the progress of the repairs, the stringent course adopted toward the commander of the vessel in order to obtain the arrest of the men who were discovered to have gone on board of her, and the prosecution and punishment of those of them who were amenable to the law, all show the determination of the Governor and his advisers to prevent any violation of neutrality so far as it was in their power to do so. Such was, in fact, the impression originally made by the report of their proceedings upon the mind of Mr. Adams, as shown by his letter to Mr. Seward of the 12th April, 1865.[2]

The United States have, in their Counter Case, (Sec. VIII, par. 4,) questioned the accuracy of the observations made at page 160 of the British Case as to the composition of the crew of the Shenandoah, and as to the statements made by a man named Temple on the subject. The correspondence which took place at the time on this point will be found at pages 691–724 of the first volume of the Appendix to the British Case, and will, Her Majesty's Government believes, amply bear out all that has been said in the British Case. It will be seen from the list annexed to Temple's affidavit (page 701) that the composition of the crew was as stated, and from the police report (page 714) that Temple himself admitted that a considerable portion of his own affidavit was false.

Charge as to Confederate agencies in Great Britain for war purposes.

89. Stress has been laid, in the Case of the United States, on the alleged facts that the vessels in question were built and prepared for sea under the superintendence of Bullock, who was an agent of the Confederate Government, or some other agent of that Government; that the armament sent out for them was also procured and sent out under Bullock's orders, and that the officers and men drew their pay through a firm of merchants in Liverpool.

Although most of the evidence adduced in support of these allegations is of little value, and they rest even now, to a considerable extent, on conjecture and suspicion, there is little doubt that, as to some of the vessels, they are substantially true. But it cannot be admitted that, if true, they impose a liability on Great Britain.

90. It is to be observed, in the first place, that the information on which the United States now rely was not, at the times with reference to which the question of due diligence has to be determined, in the possession of the British Government; much of it had not even been acquired by the Government of the United States. Of Bullock's employment, and of the facts that he was an agent of the Confederate Government, and that he had anything to do with the contract for building the Alabama, the British Government, up to the time of the departure of the Alabama, and until long afterward, had no proof beyond such statements—unsupported by anything which could properly be called evidence—as were contained in the depositions furnished by Mr. Dudley and Mr. Adams, in relation to that vessel, a few days before she sailed.[3]

[1] The paper referred to in the Counter Case of the United States, as showing that the repairs to the machinery of the vessel were not commenced until she had been fourteen days in port, gives also the reason of the delay, viz, that they could not be effected until the vessel was placed upon the slip. This latter operation had been delayed by the state of the weather and tides. Appendix to British Case, vol. i, pp. 529, 530.

[2] Appendix to Case of the United States, vol. i, pp. 641, 642.

[3] British Case, pp. 87–89, 92, 95; Appendix to ditto, vol. i, pp. 189–192, 195.

Bullock's transactions were surrounded with the utmost secrecy, and screened by the employment of intermediate agents; and what the Government of the United States knew or suspected about them appears to have been derived from reports which they were unable to authenticate. After the departure of the Alabama, Bullock does not appear to have succeeded in sending to sea a single vessel intended for a Confederate cruiser. After the arrest of the Alexandra and the defeat of the scheme for procuring the two rams, he seems to have transferred his operations to France, where he contracted for six iron-clads, and succeeded in obtaining one.[1] It does not appear, nor does the British Government understand the United States to allege, that he had anything to do with the Georgia or Shenandoah.

91. It must be observed, further, that schemes and operations, such as are attributed to Bullock, can in England be repressed by the interposition of the Executive, only when and so far as they take the form of actual infringements of the law. The law selects those acts which it is practicable and expedient to prohibit and punish as criminal, and these it prohibits and punishes; the Executive can act only by enforcing the law, and it has not the power to expel from its territory persons whose proceedings it may disapprove, or whom it may regard with suspicion. Nor does Her Majesty's Government understand that such a power exists in the United States. The numerous expeditions which have been fitted out in the United States against friendly countries have been organized systematically by persons residing in the United States, sometimes resident there for that special purpose. But the Government of the United States has admitted no liability on that account,[2] and has not interfered, unless or until it had reason to believe that the law was being broken.[3] The payment of money to the families or relatives of men serving in Confederate ships was not a breach of the law. On the other hand, enlisting men for that service, or inducing them to go abroad for that purpose, was an offense; and, whenever evidence of this could be obtained, prosecutions were instituted against the persons incriminated.[4]

In a letter, dated January 27, 1865, from Mr. Morse, the Consul of the United States in London, communicated by Mr. Adams to Earl Russell, mention was made of the "head of the Confederate Navy Department in Europe, Commodore Barron."[5] This officer was resident at Paris, from whence he appears to have issued instructions to officers commanding Confederate ships of war. A letter of instructions from him to the Commander of the Florida, dated Paris, 25th January, 1864, was found on board of that vessel when captured at Bahia.[6] Her Bri-

[1] Appendix to Counter Case of the United States, pp. 850, 857; British Counter Case, p. 122.

[2] In a correspondence which has recently passed between the Governments of the United States and of Nicaragua, and which has been published in the Official Gazette of the latter Republic, the United States have distinctly declined to agree to the reference to a Commission of the claims of Nicaraguan citizens arising out of the acts of filibustering expeditions from the United States, and the bombardment of Greytown, declining all responsibility in regard to these claims, and stating that, as regards the acts of Walker, the filibustering chief, they felt conscious that they had fulfilled all that could be required of them, either by the laws of the United States or by international law.

[3] British Counter Case, pp. 25–47; pp. 82–85, (note.)

[4] See the trial of Messrs. Jones and Highatt, for enlisting men for the Georgia; of Mr. Rumble, for enlisting men for the Rappahannock; of Captain Corbett, for enlisting men for the Shenandoah; of James Cunningham, Edward and James Campbell, and John Seymour. Appendix to Case of the United States, vol. iv, pp. 550–618.

[5] Appendix to Case of the United States, vol. ii, p. 175.

[6] Appendix to British Case, vol. i, p. 150.

tannic Majesty's Government is not aware that any proceedings were taken against Commodore Barron by the Government of France.

92. It would be extravagant to contend that the want of power to prevent a belligerent from having agencies in a neutral country for the purpose of making mercantile contracts for such articles as it needs, or for the payment and receipt of money on its account, (although some of such contracts and payments may have been connected with ships intended for, or actually in, its service,) is equivalent to a permission to that belligerent to employ the neutral territory as "a base of naval operations."

93. Upon this subject it seems necessary to observe that, although, in the diplomatic correspondence, during the war, of the American Government with Mr. Adams, its minister in Great Britain, and of Mr. Adams with the British Government, allegations were frequently made that Great Britain and her colonies were used as a "base of operations" against the United States, that "war was virtually carried on," and that hostile "expeditions" were prepared from and in British ports—the same correspondence, when examined with care, and with a due regard to the order of events, proves that these and similar phrases were really employed to describe what the Government of the United States regarded as the combined and aggregate effect of a great variety of matters—the existence of Confederate agencies and agents in Great Britain, the supplies of arms, munitions of war, and ships, by blockade-running and otherwise, to the Confederate States, and the negotiation of the Confederate cotton loan—with each and all of which the British Government was continually urged to interfere, although (except as to such of them as could be brought within the terms of the Foreign-Enlistment Act) they were neither enabled by their own municipal law, nor bound by international law, to do so.

94. Of this statement, the following proofs will suffice. On the 12th May, 1862, Mr. Adams wrote thus to Earl Russell: "It is very certain that many British subjects are now engaged in undertakings of a *hostile character to a foreign State, which, though not technically within the strict letter of the enlistment act, are as much contrary to its spirit as if they levied war directly.* Their measures embrace all the operations preliminary to openly carrying on war—the supply of men, and ships, and arms, and money, to one party, in order that they may be the better enabled to overcome the other;" * * * and he, immediately afterward, speaks of "*this virtual levying of war* from the ports of a friendly power."[1]

On the 9th March, 1863, (many months after the Alabama had commenced her cruise,) Mr. Seward wrote to Mr. Adams on the subject of a recent capture by the Florida, and of the question, then under consideration by the President, whether letters of marque should be granted to protect the commercial marine of the United States against the confederate cruisers. "The argument," he said, "as it is put in American commercial circles, is, that war is carried on against the United States by forces levied and dispatched from the British Islands, while the United States are at peace with Great Britain. *Though we may regard this statement of the case as extravagant, if not altogether erroneous*, it cannot be concealed that it has sufficient appearance of truth *on this side of the ocean* to render it necessary to protect our commerce by employing every possible means of defense."[2] This dispatch was read by Mr. Adams to Earl Russell on the 26th March, 1863.[3]

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[1] Appendix to Case of the United States, vol. i. p. 663.
[2] Ibid., p. 576.
[3] Ibid., p. 581.

In replying to these and similar letters, the distinction between what had actually been done, and a virtual carrying on of war from Great Britain, or the use of British territory as a base of warlike operations, was well pointed out by Earl Russell, in letters dated the 12th June, 1862, 27th March, 1863, and 2d April, 1863;[1] at the same time that he declared the determination of the British Government to use all the means in its power to prevent any breaches of the Foreign-Enlistment Act. The good faith with which those declarations were acted on was on many subsequent occasions acknowledged.

Mr. Adams, on the 6th of April, 1863, with reference to certain American authorities which had been appealed to by Earl Russell and the soundness of which he (Mr. Adams) admitted, thus put his argument: "The sale and transfer, by a neutral, of arms, of munitions of war, *and even of vessels of war, to a belligerent country, not subject to blockade at the time, as a purely commercial transaction, is decided by these authorities not to be unlawful.* They go not a step further; and *precisely to that extent I have myself taken no exception to the doctrine.* But the case is changed when a belligerent is shown to be taking measures to establish a system of operations in a neutral country, with the intent to carry on a war from its ports much in the same way that it would do, if it could, from its own territory; when it appoints agents residing in that country for the purpose of borrowing money to be applied to the fitting out of hostile armaments in those very ports, and when it appoints and sends out agents to superintend in those ports the constructing, equipping, and arming ships of war, as well as the enlisting of the subjects of the neutral country, to issue forth for the purpose of carrying on hostilities on the ocean."[2]

The doctrine suggested in this letter, that the existence of a blockade gives to a trade in articles contraband of war with the blockaded belligerent a character different, in the view of international law, (so far as the duties of a neutral Government are concerned,) from that which it would otherwise possess, is (as Her Majesty's Government conceives) entirely unwarranted, either by reason or by authority.

On the 14th November, 1863, Mr. Seward, communicating to Mr. Adams information which he had received from the Canadian authorities, as to certain designs of emigrant insurgents in Canada against the territory of the United States, and expressing the satisfaction of the President at the friendly proceedings of those authorities, followed up a suggestion as to some possible amendments of the laws of the two nations, by the inquiry: "Could we possibly avoid conflicts between the two countries, *if British shores or provinces should, through any misunderstanding, be suffered to become bases for military and naval operations against the United States?*"[3] He then, apparently, still considered the suggestion that they had already become so, (in the language of his former letter of the 9th March, 1863,) as "extravagant, if not altogether erroneous." Yet, on the 6th of January, 1864, he wrote to Mr. Adams as if certain papers, showing "that the belligerents have a regularly constituted treasury and counting house, with agents in London for paying the wages of the British subjects who are enlisted there in this nefarious service," were sufficient to "prove, beyond a possible doubt, that a systematic naval war has been carried on for more than a year, by subjects of Her Majesty, from the British Islands as a base;" and that, by means of this evidence, the difficulty previously felt by Her Majesty's Government in acting upon remonstrances, which were

[1] Appendix to Case of United States, vol. i, pp. 665, 584, 589.
[2] Ibid., pp. 591, 592.
[3] Ibid., p. 576.

"held inconclusive and unsatisfactory, because it was said that they were not attended with such clear, direct, and conclusive proofs of the offenses complained of as would enable the Government to arrest the offenders, and apply judicial correction to the practices indicated," had been "fully and completely removed."[1]

This was followed up, on the 11th of March, 1864, by another letter from Mr. Seward, in which he said: "*It was seen, as we thought, early in the month of December last, that British ports, at home and abroad, were becoming* a base for operations, hostile and dangerous to the United States;"[2] and, on the 2d of July, 1864, by a further letter, saying (with manifest reference to the trade of blockade-runners, carried on from the Bahamas and elsewere,) "You can hardly omit to inform Earl Russell that the whole of the British West India Islands are practically used by our insurgent enemies as a base for hostile operations against the United States; and the profits derived by British subjects from these enterprises are avowed in every part of the British empire with as much freedom, and as much satisfaction, as if the operations were in conformity with international law, and with treaties."[3]

It is satisfactory to Her Majesty's Government to be able to add to these extracts another, from a letter written by Mr. Seward on the 28th of the same month of July, 1864: "During the latter part of the year 1863, the Government of Great Britain manifested a decided determination, not only to avoid intervention, but also to prevent unlawful naval intervention by British subjects. This manifestation produced a very happy effect in the United States."[4]

95. What was, from time to time, actually and successfully done by Great Britain to prevent any unlawful equipments, or augmentation of the naval force of the Confederate Government within her territory, has been sufficiently stated in the British Case.[5] The Arbitrators also know in what instances, and under what circumstances, the vigilance of Her Majesty's Government is said to have been insufficient, or to have been eluded. But a still more adequate conception of the difference, between the plans which, according to the information from time to time obtained by the agents of the United States, were formed or supposed to have been formed, for obtaining ships useful for war purposes of the Confederate States from British territory, and the actual results of those plans, (and, therefore, a more adequate conception of the general efficacy of the attitude assumed and the means used by the British Government for the maintenance of Her Majesty's neutrality,) may be arrived at from some other parts of the same correspondence, contained in the first volume of the Appendix to the Case of the United States.

96. In August, 1861, Mr. Seward heard, through what he considered "a very direct channel," that Captain Bullock had "contracted for *ten* iron steamers—gun-boats—all to be armed, at $750,000 for all, and all to come out as war-vessels."[6] In February, 1862, he received information from Mr. Morse, the United States Consul in London, that the Confederate Agents in London and Liverpool were "engaged in preparing *a whole fleet* of piratical privateers," to depredate on American commerce in European waters.[7] Mr. Adams had heard in April, 1862, that "as many as *fifteen* vessels" were preparing to sail from British waters "to assist the insurgents."[8] On the 28th of April, 1862, Mr. Seward wrote: "Captain Bullock, of Georgia, is understood to have written

[1] Appendix to Case of the United States, vol. i, p 609.
[2] Ibid., p. 358.
[3] Ibid., p. 613.
[4] Ibid, p. 508.
[5] British Case, pp. 31–50.
[6] Appendix to Case of the United States, vol. i, pp. 517, 518.
[7] Ibid., pp. 344, 345.
[8] Ibid., p. 240.

that he has *five* steamers built, or bought, armed, and supplied with material of war in England, which are now about being, or are on their way to aid the insurgents."[1] In May, 1862, Mr. Dudley, the United States Consul at Liverpool, gave information to Mr. Adams and Mr. Morse of "the purchase of *thirty steamers, for the purpose of making a combined attack on our coasts.*[2] On the 8th September, 1862, Mr. Seward wrote: "We hear, officially and unofficially, of great naval preparations which are on foot in British and other foreign ports, under cover of neutrality, to give the insurgents a naval force. Among the reports is one that a naval armament is fitting out in England to lay New York under contribution."[3] In certain intercepted letters of Confederate Agents, of August and October, 1862, it was stated that a person (an American) named Sanders had contracted with the Naval Department of the Confederate States for *six iron-clad steamers* from England;[4] with respect to which he said, "great skill and diplomacy must be exercised to avoid the interference of European Governments."[5] On the 30th December, 1862, Mr. Dudley informed Mr. Seward of the preparation of a most formidable ram at Glasgow, and two iron-clad rams in London, and three other suspected vessels, (besides the Alexandra, and the rams at Birkenhead.)[6] In April, 1863, information came of privateers fitting out in Vancouver's Island:[7] and at a later date, February, 1865, of an expedition against New York, to consist of "*five iron-clads*, on their way from French and English ports," with the aid of "five blockade-running steamers, to be converted into privateers, armed with two guns each."[8]

97. This series of reported designs, which were never accomplished, at once proves how impossible it was for the British authorities to act indiscriminately, and without evidence, upon every alarming report and rumor which might be conveyed to them by the Agents of the United States in this country, and shows what might actually have been done, if those authorities had really been careless or negligent as to the enforcement of the law, or had really permitted Her Majesty's territory to be used as a base of hostile operations against the United States. If such designs were formed, Mr. Adams merely spoke the truth, when, writing of the Confederacy on 21st of July, 1864, he said "its audacious attempts to organize a navy in this kingdom (Great Britain) *have utterly failed.*"[9]

98. An answer has been given to the complaints which the United States make against Great Britain in respect of the alleged equipment in British ports of vessels intended for the Confederate service, and of the original departure from British territory of vessels alleged to have been specially adapted with in it to warlike use. But it is further urged, on the part of the United States, that the four vessels now in question, (the Florida, Alabama, Georgia, and Shenandoah,) after having been procured from British ports by agents of the Confederate Government, and converted into ships of war, entered, whilst cruising in that character, several ports within the Colonial possessions of Great Britain; and it is contended that, when that occurred, the British authorities were under an obligation to seize and detain them; and that for the non-performance of this obligation Great Britain is liable to the United States.

Complaint that Confederate cruisers, visiting British ports, were not seized and detained.

[1] Appendix to Case of the United States, vol. i, p. 243.
[2] Ibid., p. 649.
[3] Ibid., p. 542.
[4] Ibid., p. 573.
[5] Ibid., p. 571.
[6] Ibid., p. 651.
[7] Ibid., p. 596.
[8] Ibid., p. 635.
[9] Ibid., p. 507.

99. The demands of the United States upon Great Britain during the war were, as to many things, greatly in excess of what could be justified by international law; but an obligation like this was never suggested, except upon the view that all Confederate ships of war and privateers, which might be found upon the ocean, ought to be treated as pirates, and denied any belligerent character or belligerent rights.

100. It rests with the United States, which assert this obligation, to prove that it existed. They have attempted to support it by putting a forced interpretation on one of the clauses in the first of the three Rules—an interpretation plainly at variance with its natural and obvious meaning. If the sense thus ascribed to the Rule had been its true sense, it could have applied only to vessels which could be proved to have been specially adapted within British territory to warlike use, a description which might include the Alabama, but could not possibly include the Georgia or Shenandoah. To these, therefore, the rule, even if construed in this strained and unnatural manner, could not apply. But the reasons given in the British Counter Case (Part II, p. 17) for altogether rejecting this construction, which was not at the time within the contemplation of the high contracting parties, and is wholly repudiated by Great Britain, are, in the view of the British Government, conclusive.

101. That the argument of the United States on this point is not only unsupported by the principles which have hitherto governed the admission of public ships of war into neutral ports, but in direct conflict with those principles, has likewise been shown in the Counter Case of Great Britain, (Part II, pp. 18–20.) The general principle was there stated as follows:

> A vessel commissioned as a public ship of war, entering a foreign port, is a portion of the naval force of the Government by which she is commissioned, commanded by its officers, and displaying the ensigns of its authority. Any act of force directed against her (unless to prevent or repel aggression, or compel her to depart after having been required to do so by competent authority) would be directed against her Government, and would at the same time, if done without previous warning, be an infraction of a recognized understanding, on the faith of which she entered, and on the observance of which she had a right to rely. If, while in neutral waters, she commits any violation of neutrality or other offense against the neutral, force may undoubtedly be employed, in any way which may be necessary, in order to prevent or arrest the unlawful act, and to compel her departure. But redress ought not to be sought against the ship herself; it should be sought, if needful, against her Government. *A fortiori*, this is true if the offense were committed before she arrived at the neutral port. Thus, of the violations of neutrality committed during the war the grossest and most flagrant by far was that perpetrated by the Wachusett in the harbor of Bahia. The Brazilian authorities would have been amply justified in firing on that vessel while engaged in the act, and sinking her if necessary. If she had afterward presented herself in a Brazilian port, they would doubtless have refused her admission; but they would have rightly abstained, even on such provocation, from seizing and detaining her. *A multo fortiori*, the same proposition holds good if the act complained of were done before the offending ship came into the possession of the commissioning Government, or before she was incorporated into its naval service.

The British Government believes this statement to be agreeable to authority, and to general usage. It is supported by the American judgments, in the cases of the Santissima Trinidad[1] and the Exchange.[2]

102. Were then these vessels, supposing it proved that they or any of them had, before being commissioned, become liable to seizure for an offense against law, (the proof of which rests with the United States,) not correctly regarded by the British Colonial authorities as public commissioned ships? It would be enough to answer that, if this were so, the same error was committed by the authorities of France,

[1] Appendix to British Case, vol. iii, p. 86. [2] See British Counter Case, p. 20, note.

Brazil, the Netherlands, and other neutral Powers, and similar accusations might with equal justice be directed against them also.[1] But no error was committed either by those Powers or by Great Britain. The vessels in question entered the ports of neutral nations with those evidences of being public commissioned ships, which by universal usage would have been accepted as sufficient if they had borne the flag of a recognized sovereign State; and these evidences were accepted in other neutral ports as well as those of Great Britain. There is no reason to doubt that they were in fact validly commissioned, according to established usage under the authority of commissions and orders issued by the Government of the Confederate States. The circumstance that the particular act[2] by which the vessel was invested with a public character was in each case done, not within the territory held and controlled by that Government, but at sea, was not, according to usage, material, since it is perfectly competent for any Government to commission, out of its dominions, vessels which may never have been within the circuit of them, and this has been of no infrequent occurrence.

Indeed, in the very year 1864, in which the Shenandoah was commissioned, a merchant vessel called the Takiang was chartered and commissioned for the United States naval service at Shanghai, and an officer, a party of men, and a gun having been placed on board of her, she was dispatched to join the allied fleet in Japan, where she took part in the action fought at Simonasaki on the 4th of September.[3]

103. The only question, therefore, which remains is, whether the circumstance that the Confederate States, though recognized as belligerent, had not been recognized as sovereign, made it the duty of the authorities of neutral ports, in this one particular respect, not to treat vessels commissioned by the Confederate Government as they would have been bound to treat commissioned ships of a recognized Power. The answer to this question cannot be doubtful, if we consider, in the first place, the principle of a recognition of belligerency; and, secondly, the reason of the general immunity from local jurisdiction everywhere conceded to public vessels of war.

104. A neutral power which recognizes as belligerent a community which it has not recognized as sovereign, thereby allows, as against itself, to that community all the *jura belli;* the first of which is the right to employ military and naval forces, and to make provision, in the customary modes, for their command and discipline. The right to appoint and commission officers, and to commission ships of war, is essential to the exercise of the *jus belli* at sea; regular warfare—in other words, war regulated, controlled, and moderated by established rules and usages—would, indeed, be impossible without it; such commissions, therefore, are of necessity recognized by the neutral Power; and vessels armed with them are allowed to exercise, as against the ships and subjects of the neutral, those *jura belli*, which are by usage exercisable by regularly commissioned ships. To merely honorary privileges, such as salutes and the like, officers of a Government not recognized as sovereign have no claim, though no law or custom forbids that the courtesies which officers of different nations are accustomed to exchange should be shown to them personally. The British Government, during the war,

[1] British Case, pp. 12, 17. Appendix to British Case, vol. vi, pp. 1–148. British Counter Case, pp. 119–123.

[2] As to this, see British Case, p. 24.

[3] Correspondence respecting affairs of Japan, (Japan No. 1, 1865,) presented to Parliament 1865, pp. 100–109.

gave orders that the Confederate flag should not be saluted.[1] But the principle of an impartial neutrality requires that any powers, liberties, or immunities, the refusal of which to one belligerent would place him at a disadvantage in matters relating to the war, should be admitted to belong, for the purposes of the war, to both alike.

105. What, then, is the reason of the immunity from local jurisdiction, which is secured by custom to public ships of war, and to what class of privileges does it belong? Is it to be reckoned among honorary privileges, and regarded as affecting only or chiefly the dignity of the Sovereign or State under whose flag the vessel sails? Clearly, this is not so. The reason (which has been frequently explained) is, that this exceptional immunity is necessary, in order to prevent the operations in which, and the objects for which, a military or naval force is employed, from being subject to be defeated or interfered with by the action of a foreign Power. It is essential that the supreme and undivided command of those forces and every part of them should be exercised by the Head or Government of the State, independently of all external control; and this is a right which no State would ever consent to forego.[2] It is manifest that this reason is as strong in the case of a community, under a *de facto* Government, carrying on war, but not recognized as sovereign, as in that of a recognized sovereign State; and that to refuse this freedom to one of two belligerents and grant it to the other, would place the former at disadvantage in matters relating to the war, and would not be incompatible with impartial neutrality. It would be in effect to grant to the one and refuse to the other access to the ordinary hospitalities of the neutral port; since it is improbable that any belligerent Government would suffer its armed ships to subject themselves, by entering the territorial waters of a foreign sovereign, to any other jurisdiction than its own. Such has been the practice of all civilized nations during revolutionary wars, before an insurgent population has established its title to be recognized as an independent State; such were the principles and the practice of the United States during the wars between Spain and Portugal and their revolted Colonies, before those Colonies had achieved their independence.

106. A passage in Mr. Justice Story's judgment in the case of the Santissima Trinidad sums up in so clear a manner the consequences resulting from the existence of belligerency and neutrality, in a case of civil war, that it may, with much advantage, be here subjoined. The question related to the ship Independencia, which had passed into the war service of the Revolutionary Government of Buenos Ayres, under the circumstances stated in an earlier part of the present Argument.[3]

"In general," said that eminent judge, "the commission of a public ship, signed by the proper authorities of the nation to which she belongs, is a complete proof of her national character. A bill of sale is not necessary to be produced, nor will the Courts of a foreign country inquire into the means by which the title to the property has been acquired. It would be to exert the right of examining into the validity of the acts of the foreign sovereign, and to sit in judgment upon them, in cases where he has not conceded the jurisdiction, and where it would be inconsistent with its own supremacy. The commission, therefore, of a public ship, when duly authenticated—so far, at least, as foreign Courts are concerned—imports absolute verity, and the title is not examinable. The property must be taken to be duly acquired, and cannot be controverted. This has been the settled practice between nations; and it is a rule founded in public convenience and policy, and cannot be broken in upon without endangering the peace and repose as well of neutral as of belligerent sovereigns. The commission in the present case is not expressed in the most unequivocal terms; but its

[1] British Counter Case, p. 121. Appendix to British Case, vol. v, p. 129.
[2] British Counter Case, pp. 14, 19.
[3] See *ante*, p. 7.

fair purport and interpretation must be deemed to apply to a public ship of the Government. If we add to this the corroborative testimony of our own and the British Consul at Buenos Ayres, as well as that of private citizens, to the notoriety of her claim to a public character, and her admission into our ports as a public ship, with the immunities and privileges belonging to such ship, with the express approbation of our own Government, it does not seem too much to assert, whatever might be the private suspicion of a lurking American interest, that she must be judicially held to be a public ship of the country whose commission she bears.

"There is another objection urged against the admission of this vessel to the privileges and immunities of a public ship which may well be disposed of in connection with the question already considered. It is that Buenos Ayres has not been acknowledged as a sovereign, independent Government by the Executive or Legislature of the United States, and therefore is not entitled to have her ships of war recognized by our courts as national ships. We have in former cases had occasion to express our opinion on this point. The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same rights of asylum and hospitality and intercourse. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war, and entitled to be respected in the exercise of those rights. We cannot interfere to the prejudice of either belligerent, without making ourselves a party to the contest and departing from the posture of neutrality. All captures made by each must be considered as having the same validity; and all the immunities which may be claimed by public ships in our ports under the law of nations must be considered as equally the right of each."[1]

107. Some inconvenience may arise (as appears to be suggested in the Counter Case of the United States) from the circumstance that, should any cause of complaint arise, no *official* representations can be made by the neutral to a Government with which it has no official intercourse. But this inconvenience is liable to occur in every case in which a belligerent cruiser commissioned by such a Government may have done any unlawful or improper act on the high seas, such as an irregular exercise of the right of search or an illegal capture. This has not, however, prevented neutrals from conceding to such cruisers on the high seas the exercise of the rights which belong to ships duly commissioned. Again, inconvenience may arise where citizens or subjects of the neutral, who may be within the territory held and ruled by such a Government, have suffered from any real or apparent abuse of power. Yet it has not been the practice of neutrals in such cases to treat the *de facto* Government as non-existent, although they may not have recognized it as sovereign. More than once during the war Her Majesty's Government was desirous of addressing unofficial representations to the Government existing in the Confederate States; and it was prevented from doing so only by the refusal of the United States Government to allow such communications to pass through the blockaded ports. But it is clear that this refusal could not impose on neutral powers any obligation to treat Confederate ships or the Confederate Government itself in a manner different from that in which they would otherwise have been entitled to treat them.

108. The British Government will here repeat, as bearing on this part of the subject, two propositions already stated in the commencement of its Case, and which it believes to be incontrovertible:

Maritime war being carried on by hostilities on the high seas, and through the instrumentality (ordinarily) of vessels commissioned by public authority, a neutral power is bound to recognize, in matters relating to the war, commissions issued by each belligerent, and captures made by each, to the same extent and under the same conditions as it recognizes commissions issued and captures made by the other.

[1] Appendix to British Case, vol. iii, p. 86. A portion of the passage given above was cited by Mr. Justice Grier when delivering the judgment of the Supreme Court in the cases of the British ship Hiawatha and three other vessels captured by United States cruisers in the first year of the civil war. See also judgments in the case of the Divina Pastora and Estrella. (Ibid., pp. 80, 81.)

Where either belligerent is a community or body of persons not recognized by the neutral power as constituting a sovereign State, commissions issued by such belligerent are recognized as acts emanating, not indeed from a sovereign Government, but from a person or persons exercising *de facto*, in relation to the war, the powers of a sovereign Government.[1]

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[1] British Case, p. 4.

The Counter Case of the United States contains the following statement, (sec. 1, par. 1:)

"It is assumed in that (the British) Case that the rebels of the United States were, by Her Majesty's Proclamation of May 3, 1861, invested with some undefined *political* attributes. But the United States have hitherto understood that Her Majesty's Government merely assumed to regard the persons who resisted the power of the United States as a body of insurrectionists who might be recognized as clothed with belligerent rights at the discretion of neutral powers. They therefore think it right to conclude that the frequent use in the British Case of language implying recognized *political* attributes in the insurrection is an inadvertence."

The British Government is at a loss to understand what is intended by this observation, the United States having omitted to specify or indicate the particular expressions to which they refer. But, in order to avoid misconception, Her Majesty's Government will refer to a judgment, pronounced since the conclusion of the war, by the Supreme Court of the United States, in reference to the character and status of the Confederate States and their Government during the war. There are, so far as Her Majesty's Government are aware, no expressions in the British Case which might not be used with strict accuracy and propriety by a foreign Government in reference to a state of affairs which has been thus characterized by the domestic Tribunals of the United States, and by the highest of these, the Supreme Court.

The case referred to is Thorington *vs.* Smith and Hartley, decided in the Supreme Court of the United States, in December, 1868.

The Chief Justice delivered the opinion of the Court.

"The questions before us upon this appeal are these:

"1. Can a contract for the payment of Confederate notes, made during the late rebellion, between parties residing within the so-called Confederate States, be enforced at all in the courts of the United States?

"2. Can evidence be received to prove that a promise expressed to be for the payment of dollars, was, in fact, made for the payment of any other than lawful dollars of the United States?

"3. Does the evidence in the record establish the fact that the note for $10,000 was to be paid, by agreement of the parties, in Confederate notes?

"The question is by no means free from difficulty. It cannot be questioned that the Confederate notes were issued in furtherance of an unlawful attempt to overthrow the Government of the United States by insurrectionary force. Nor is it a doubtful principle of law that no contracts made in aid of such an attempt can be enforced through the Courts of the country whose Government is thus assailed. But, was the contract of the parties to this suit a contract of that character? Can it be fairly described as a contract in aid of the rebellion?

"In examining this question, the state of that part of the country in which it was made must be considered. It is familiar history, that early in 1861 the authorities of seven States, supported, as was alleged, by popular majorities, combined for the overthrow of the National Union, and for the establishment, within its boundaries, of a separate and independent confederation. A governmental organization, representing these States, was established at Montgomery, Alabama, first under a Provisional Constitution, and afterward under a constitution intended to be permanent. In the course of a few months four other States acceded to this Confederation, and the seat of the central authority was transferred to Richmond, Virginia. It was, by the central authority thus organized, and under its direction, that civil war was carried on upon a vast scale against the Government of the United States for more than four years. Its power was recognized as supreme in nearly the whole of the territory of the States confederated in insurrection. It was the actual Government of all the insurgent States except those portions of them protected from its control by the presence of the armed forces of the National Government.

"What was the precise character of this Government in contemplation of law?

"It is difficult to define it with exactness. Any definition that may be given may not improbably be found to require limitation and qualification. But the general principles of law relating to *de facto* Government will, we think, conduct us to a conclusion sufficiently accurate.

"There are several degrees of what is called *de facto* Government.

"Such a Government, in its highest degree, assumes a character very closely resembling that of a lawful Government. This is when the usurping Government expels the regular authorities from their customary seats and functions, and establishes itself in

109. It is an error therefore to suppose that it was the duty of the authorities in any British port to seize or detain Confederate ships of war on the ground that they were suspected or believed to have been originally obtained from England or equipped there by violation or evasion of the law. On the contrary, to do this would have been a departure from the principles of an impartial neutrality: to do it without some previous notice, excluding them from the right of admission to

ing characteristic of such a Government is, that adherents to it in war against the Government *de jure* do not incur the penalties of treason; and under certain limitations, obligations assumed by it in behalf of the country, or otherwise, will, in general, be respected by the Government *de jure* when restored.

"Examples of this description of Government *de facto* are found in English history. The statute 11 Henry VII, c. 1, relieves from penalties for treason all persons who, in defense of the King for the time being, wage war against those who endeavor to subvert his authority by force of arms, though warranted in so doing by their lawful monarch.

"But this is where the usurper obtains actual possession of the royal authority of the kingdom; not when he has succeeded only in establishing his power over particular localities. Being in possession, allegiance is due to him as King *de facto*.

"Another example may be found in the Government of England under the Commonwealth, first by Parliament, and afterwards by Cromwell as Protector. It was not, in the contemplation of law, a Government *de jure*, but it was a Government *de facto* in the most absolute sense. It incurred obligations and made conquests which remained the obligations and conquests of England after the Restoration. The better opinion doubtless is, that acts done in obedience to this Government could not be justly regarded as treasonable, though in hostility to the King *de jure*. Such acts were protected from criminal prosecution by the spirit, if not by the letter, of the statute of Henry the Seventh. It was held otherwise by the judges by whom Sir Henry Vane was tried for treason, in the year following the Restoration. But such a judgment, in such a time, has little authority.

"It is very certain that the Confederate Government was never acknowledged by the United States as a *de facto* Government in this sense. Nor was it acknowledged as such by other powers. No treaty was made by it with any civilized State. No obligations of a national character were created by it, binding, after its dissolution, on the States which it represented, or on the National Government. From a very early period of the civil war to its close, it was regarded as simply the military representative of the insurrection against the authority of the United States.

"But there is another description of Government, called also by publicists a Government *de facto*, but which might, perhaps, be more aptly denominated a Government of paramount force. Its distinguishing characteristics are, (1,) that its existence is maintained by active military power, within the territories, and against the rightful authority of an established and lawful Government; and (2,) that while it exists, it must necessarily be obeyed in civil matters by private citizens, who, by acts of obedience, rendered in submission to such force, do not become responsible, as wrong-doers, for those acts, though not warranted by the laws of the rightful Government. Actual Governments of this sort are established over districts differing greatly in extent and conditions. They are usually administered directly by military authority, but they may be administered also by civil authority, supported more or less directly by military force.

"One example of this sort of Government is found in the case of Castine, in Maine, reduced to British possession during the war of 1812. From the 1st of September, 1814, to the ratification of the Treaty of Peace in 1815, according to the judgment of this Court in United States *vs.* Rice, 'the British Government exercised all civil and military authority over the place. The authority of the United States over the territory was suspended, and the laws of the United States could no longer be rightfully enforced there, or be obligatory upon the inhabitants who remained and submitted to the conqueror. By the surrender, the inhabitants passed under a temporary allegiance to the British Government, and were bound by such laws, and such only, as it chose to recognize and impose.' It is not to be inferred from this that the obligations of the people of Castine as citizens of the United States were abrogated. They were suspended merely by the presence, and only during the presence, of the paramount force. A like example was found in the case of Tampico, occupied during the war with Mexico by troops of the United States. It was determined by this Court, in Fleming *vs.* Page, that, although Tampico did not become a port of the United States in consequence of that occupation, still, having come, together with the whole State of Tamaulipas, of which it was part, into the exclusive possession of the national forces, it must be regarded and respected by other nations as the territory of the United States. These were cases of temporary possession of territory by lawful and regular Governments at war with the country of which the country so possessed was part.

British ports according to the ordinary practice of nations, would have been a flagrant public wrong.

110. But it may be observed that in order to charge Great Britain with a breach of international duty, and a consequent heavy liability, on the plea that they were not arrested and detained by the authorities of the British Colonies visited by them, it would be necessary to prove, not only that the forbearance to do so was a mistaken exercise of judg-

"The Central Government, established for the insurgent States, differed from the temporary Governments at Castine and Tampico in the circumstance that its authority did not originate in lawful acts of regular war; but it was not, on that account, less actual or less supreme. And we think that it must be classed among the Governments of which these are examples. It is to be observed that the rights and obligations of a belligerent were conceded to it, in its military character, very soon after the war began, from motives of humanity and expediency by the United States. The whole territory controlled by it was thereafter held to be enemies' territory, and the inhabitants of that territory were held, in most respects, for enemies. To the extent, then, of actual supremacy, however unlawfully gained, in all matters of government within its military lines, the power of the insurgent Government cannot be questioned. That supremacy did not justify acts of hostility towards the United States. How far it should excuse them must be left to the lawful Government upon the re-establishment of its authority. But it made obedience to its authority, in civil and local matters, not only a necessity but a duty. Without such obedience, civil order was impossible.

"It was by this Government exercising its power throughout an immense territory that the Confederate notes were issued early in the war, and these notes in a short time became almost exclusively the currency of the insurgent States. As contracts in themselves, except in the contingency of successful revolution, these notes were nullities; for, except in that event, there could be no payer. They bore, indeed, this character upon their face, for they were made payable 'after the ratification of a treaty of peace between the Confederate States and the United States of America.' While the war lasted, however, they had a certain contingent value, and were used as money in nearly all the business transactions of many millions of people. They must be regarded, therefore, as a currency, imposed on the community by irresistible force.

"It seems to follow as a necessary consequence from this actual supremacy of the insurgent Government, as a belligerent, within the territory where it circulated, and from the necessity of civil obedience on the part of all who remained in it, that this currency must be considered in courts of law in the same light as if it had been issued by a foreign Government, temporarily occupying a part of the territory of the United States. Contracts stipulating for payments in this currency cannot be regarded for that reason only as made in aid of the foreign invasion in the one case, or of the domestic insurrection in the other. They have no necessary relations to the hostile Government, whether invading or insurgent. They are transactions in the ordinary course of civil society; and, though they may indirectly and remotely promote the ends of the unlawful Government, are without blame, except when proved to have been entered into with actual intent to further invasion or insurrection. We cannot doubt that such contracts should be enforced in the courts of the United States, after the restoration of peace, to the extent of their just obligation. The first question, therefore, must receive an affirmative answer."

The reasons given for the judgment of the Court on the two remaining questions have no bearing on the subject of this note.

The United States Counter Case states (sec. iii, par. 3,) that the Arbitrators will observe "that the other Governments did not recognize the title" (Confederate States) "which the insurgents had taken for themselves."

The British Proclamation of Neutrality, May 13, 1861, (Appendix to British Case, vol. iii, p. 17,) referred to the seceded States not as the "Confederate States," but as "certain States styling themselves the Confederate States;" and throughout the civil war they were constantly spoken of in the British official correspondence and notifications as the "so-styled Confederate States."

On the other hand, the Spanish Proclamation of the 17th June, 1861, (Appendix to British Case, vol. iii, p. 23,) uses the designation "Confederate States of the South." The United States Minister at Madrid informed the Spanish Government that "the President had read" this Proclamation "with the greatest satisfaction." (Diplomatic correspondence laid before Congress, 1861, p. 224.)

The circular instructions issued by the Government of Brazil, June 23, 1863, speak of "the steamer Alabama of the Confederate States." (Appendix, vol. iii, p. 25.)

The term used in the French Declaration of the 10th June, 1861, viz, "les États qui *prétendent* former une Confédération particulière," is in fact equivalent in signification to the words of the British Proclamation, "styling themselves."

ment on a question of at least reasonable doubt, but that it was a plain violation of a known and established rule. It would be impossible to maintain this with any semblance of reason. In truth, the colonial authorities acted rightly.

Complaint as to hospitalities accorded to Confederate cruisers in British ports.

111. It is further suggested by the United States that these vessels, when admitted into ports of the British Colonies, were allowed to enjoy there facilities and advantages which were not accorded to armed vessels of the United States. And (since it is evident that mere partiality, though it would be a deviation from neutrality, and, as such, a proper subject for remonstrance, would not supply a ground for such claims as those of the United States) it is also contended that these facilities and advantages were such as by the rules of international law no neutral may concede to any belligerent, and that they enabled or assisted the Confederate cruisers to inflict the losses on which the United States found their claim against Great Britain.

112. It has been clearly shown, on the contrary, in the British Counter Case, not only that the particular restrictions for which the United States contend as imposed by international law had in reality no existence, were not known to that law, and are not deducible from the three Rules of the Treaty of Washington, (Counter Case, Part II, pp. 15, 16;) but it has likewise been amply proved by a detailed examination of the facts, that all the complaints of the United States on this score are devoid of the slightest foundation; that the British Colonies, though occasionally resorted to by Confederate ships, were by far more largely and more freely used by armed vessels of the United States; that no partiality whatever was shown to the former; and that, if infractions of the Queen's Regulations were sometimes committed, the United States cruisers were the more frequent offenders; lastly, that the treatment of Confederate cruisers in British ports was essentially the same as that which they received in the ports of other neutral nations, and by no means more lax or indulgent. (Counter Case of Great Britain, Part IX.)[1]

Review of the grounds on which the claims of the United States rest.

113. It has thus been made manifest that the complaints of the United States, notwithstanding their number, the character of gravity which has been ascribed to them, and the warmth with which they have been urged, reduce themselves when examined to a very small compass. After all charges which are irrelevant, plainly inadmissible, or absolutely trivial, have been set aside, there remain only some allegations, (which Great Britain contends are erroneous,) applicable, at the most, to one or two isolated cases of unintentional delay or mistaken judgment on questions new and doubtful, on the part either of the Government itself or of sub-

[1] It is stated in the Counter Case of the United States, sec. v, par. 5, that "it appears in clear colors that Bermuda was made a base of hostile operations by the Florida. The commander of that vessel having coaled, and having been at Barbados within less than seventy days, and having then cruised off the port of New York destroying American vessels, arrived at Bermuda and informed the Governor of all these facts. The Governor, with a knowledge of them, gave him a hospitable reception and permitted him to coal and repair." This passage might lead to the impression that the Florida had coaled at Barbados within seventy days of her arrival at Bermuda, but this was not the fact. The Florida coaled at Barbados on the 24th of February, 1863. (Appendix to British Case, vol. i, p. 91.) She did not arrive at Bermuda till the 15th of July following, nor did she coal at any British port in the interval. On his arrival at Bermuda, her commander stated that he had been at sea seventy days, with the exception of visits to the Havana, Barbados, and a port in the Brazils, each of which had occupied less than twenty-four hours. (Appendix to British Case, vol. i, p. 108.) No coal was taken in at Barbados on this second visit.

ordinate officials in Great Britain or in distant colonies and dependencies. The multiplied and heavy claims which the United States make against Great Britain rest on this slender foundation.

114. The British Government will here repeat some observations which it has already presented to the consideration of the Arbitrators:

A charge of injurious negligence on the part of a sovereign Government, in the exercise of any of the powers of sovereignty, needs to be sustained on strong and solid grounds. Every sovereign Government claims the right to be independent of external scrutiny or interference in its exercise of these powers; and the general assumption that they are exercised with good faith and reasonable care, and that laws are fairly and properly administered—an assumption without which peace and friendly intercourse could not exist among nations—ought to subsist until it has been displaced by proof to the contrary. It is not enough to suggest or prove that a Government, in the exercise of a reasonable judgment on some question of fact or law, and using the means of information at its command, has formed and acted on an opinion from which another Government dissents or can induce an Arbitrator to dissent. Still less is it sufficient to show that a judgment pronounced by a court of competent jurisdiction, and acted upon by the Executive, was tainted with error. An administrative act founded on error, or an erroneous judgment of a Court, may, indeed, under some circumstances, found a claim to compensation on behalf of a person or Government injured by the act or judgment. But a charge of negligence brought against a Government cannot be supported on such grounds. Nor is it enough to suggest or prove some defect of judgment or penetration, or somewhat less than the utmost possible promptitude and celerity of action, on the part of an officer of the Government in the execution of his official duties. To found on this alone a claim to compensation, as for a breach of international duty, would be to exact, in international affairs, a perfection of administration which few Governments or none attain in fact, or could reasonably hope to attain, in their domestic concerns; it would set up an impracticable and, therefore, an unjust and fallacious standard, would give occasion to incessant and unreasonable complaints, and render the situation of neutrals intolerable. Nor, again, is a nation to be held responsible for a delay or omission occasioned by mere accident, and not by the want of reasonable foresight or care. Lastly, it is not sufficient to show that an act has been done which it was the duty of the Government to endeavor to prevent. It is necessary to allege and to prove that there has been a failure to use, for the prevention of an act which the Government was bound to endeavor to prevent, such care as Governments ordinarily employ in their domestic concerns, and may reasonably be expected to exert in matters of international interest and obligation. These considerations apply with especial force to nations which are in the enjoyment of free institutions, and in which the Government is bound to obey, and cannot dispense with, the laws.[1]

Character of the claims of United States.

115. What, then, are the claims which, on these slight and unsubstantial grounds, the United States have presented to the tribunal? They are claims for the value of all captures made by all the ships enumerated in their Case—nay, even (as it would seem) for all captures whatever ascertained to have made by confederate armed ships during the war; for all losses inflicted by them which the American citizens who have suffered thereby may think proper to ask to have charged against Great Britain; and, further, for the expenditure alleged to have been incurred in trying to capture those ships or to protect United States commerce against them.

Observations on the principle and measure of compensation.

116. The British Government has thought it right to present to the notice of the arbitrators some considerations, which it believes to be just and material, directed to show that any claims of this nature for losses in war, alleged to have been sustained through some negligence on the part of the neutral, are, in principle, open to grave objections. It has been observed that the alleged default of the neutral, even if it be established, is not, in any true or proper sense, the cause of the loss to the belligerent; certainly, it is in no sense the direct or active cause; that the only share in producing this loss which can be attributed to the neutral is indirect and passive, and consists in mere unintentional omission; that

[1] British Case, pp. 166-7.

to ascertain with any approach to precision what that share really had been would be in almost all cases difficult, and in many impossible; that there is no precedent for such claims, and that any argument which can be derived from the treaty of 1794, and the proceedings of the commissioners under it, militates against them. It was further pointed out that the relation actually held toward the United States by the people of the Confederate States, who were the active agents in inflicting the losses complained of, and by whom, according to the reasoning of the United States themselves, the neutrality of Great Britain was violated or eluded, is itself an argument against these demands. These States are part of the Union, and would share in any benefit which would accrue to its public revenue from whatever the arbitrators might award to be paid by Great Britain. On what principle of international equity, it was asked, can a Federal Commonwealth, so composed, seek to throw upon a neutral, assumed at the most to have been guilty of some degree of negligence, liabilities which belonged in the first degree to its own citizens, with whom it has now re-entered into relations of political unity, and from which it has wholly absolved those citizens?[1]

117. Supposing, however, the question of compensation to arise, and supposing the arbitrators to be of opinion that claims of this nature are not altogether inadmissible in principle, it has been maintained, on the part of Great Britain—

That the losses which may be taken into account by the arbitrators are at the utmost those only which have directly arisen from the capture or destruction, by one or more of the cruisers specified in the case of the United States, of ships or property owned by the United States, or by citizens of the United States, and that the extent of the liability of Great Britain for any such losses cannot exceed that proportion of them which may be deemed justly attributable to some specific failure or failures of duty on the part of her Government in respect of such cruiser or cruisers;

That it is the duty of the arbitrators, in deciding whether claims for compensation in respect of any particular default are tenable, and on the extent, if any, of liability incurred by such default, to take into account, not only the loss incurred, but the greater or less gravity of the default itself and all the causes which may have contributed to the loss, and particularly to consider whether the alleged loss was wholly or in part due to a want of reasonable activity and care on the part of the United States themselves, to an omission on their part to take such measures as would have prevented or stopped the depredations complained of, and conduct the operations of war, proper for that purpose, with the requisite degree of energy and judgment;

That the claims for money alleged to have been expended in endeavoring to capture or destroy any confederate cruiser are not admissible together with the claims for losses inflicted by such cruiser;[2]

That the claims for interest are clearly inadmissible. The demands of the United States are not for a liquidated sum, payment of which has been delayed by the fault of the debtor. They are a mass of doubtful claims, of unascertained amount, which have been a subject of negotiation, which Great Britain has long been willing to refer to arbitration, and which would have been so referred, had not obstacles been repeatedly interposed by the United States;[3]

[1] British Counter Case, p. 132.
[2] Ibid., p. 140.
[3] Ibid., p. 141.

That, should the tribunal award a sum in gross, this sum ought to be measured solely by the extent of liability which the tribunal may find to have been incurred by Great Britain on account of any failure or failures of duty proved against her.[1]

118. These propositions appear to Great Britain too clear to need the support of argument. It is evident that should the arbitrators be satisfied that, as to any ship and in any particular, there has been a clearly ascertained default on the part of Great Britain, it would then become their duty to examine wherein the default consisted, and whether it was a just ground for pecuniary reparation; and, if so, to determine the general limits of the liability incurred, having regard both to the nature and gravity of the default itself and the proportion of loss justly and reasonably assignable to it. The liability thus determined, or the aggregate of such liabilities, as the case may be, constitutes, it is evident, the only just measure of the compensation, if any, to be awarded to the United States. The basis of the award must be the fact, established to the satisfaction of the arbitrators, that certain losses have been sustained on the one side, which are justly attributable to certain specific failures of duty on the other, in respect of a certain ship or ships; and the basis of the award must also be the basis for computing the sum to be awarded. The power of awarding a gross sum does not authorize the arbitrators to depart, in substance, from this basis, although it may relieve them from the necessity of a minute inquiry into the particulars of alleged losses and from intricate and perhaps inconclusive calculations.

The only question which can arise, should the tribunal be satisfied that Great Britain has failed in the discharge of any international obligation toward the United States, is, what, if any, compensation in money would afford a just reparation for the loss caused by that default? International law, while it recognizes the obligation, as between sovereign States, to redress a wrong committed, knows nothing of penalties. Two alternative modes of ascertaining the amount have been provided by the treaty. But, which mode soever it may be found convenient to pursue, the question continues to be in substance the same; for the foundation of the award must remain the same, (some specific failure or failures of duty, alleged and proved to the satisfaction of the Tribunal,) and the principle of calculation, therefore, is, of necessity, the same. What is due from Great Britain? would be the question for the arbitrators; what is due from Great Britain? would, in like manner, be the question for the board of assessors, and justice would as clearly forbid that more than what is due should be awarded by the former as that less should be awarded by the latter.

119. Lastly, it has been shown by a fair and careful examination of the various classes of claims presented by the United States, so far as such an examination was possible in the absence of the necessary materials, (which the United States have not furnished,) that the estimates of losses, private and public, which have been laid before the Tribunal, are so loose and unsatisfactory, and so plainly excessive in amount, that they cannot be accepted as supplying even a *prima-facie* basis of calculation. It has been likewise shown that the estimates of expenditure were the claims on that head to be considered admissible, are also too unsatisfactory to serve a similar purpose.[2]

Some new matter being contained in the revised list of claims ap-

[1] British Counter Case, p. 132.
[2] British Counter Case, Part X, pp. 134-141; Appendix to British Case, vol. vii.

pended to the Counter Case of the United States with reference to these points, Her Majesty's Government has thought it most convenient to embody their further views and arguments on this part of the subject in a further report from the committee appointed by the Board of Trade, which constitutes the Annex (C) to this argument. A further note on the claims presented by the Government of the United States for expenditure alleged to have been incurred in the pursuit and capture of the confederate cruisers is also appended as Annex (D.)

120. With reference to the question of compensation, it has been observed that it would be unjust to hold a neutral nation liable for losses inflicted in war, which reasonable energy and activity were not used to prevent, on the plea that the vessels, which were instrumental in the infliction of the loss, were procured from the neutral country, even though it may be alleged that there was some want of reasonable care on the part of the neutral government. The utmost period over which a liability once established on the ground of default could be extended on any rational principle would be that which must elapse before the aggrieved belligerent would, by the use of due diligence and proper means on his own part, have the opportunity of counteracting the mischief.[1] The United States seem to take exception to this position. To Great Britain it appears to be just and reasonable in itself, to be supported by sound legal principles and analogies, and to be a necessary limitation of claims of this nature, should they be considered admissible in principle.

121. The British government has been compelled, therefore, to take notice of the inefficiency of the measures which were adopted by the Government of the United States during the war to protect their commerce at sea and prevent the losses of which they now complain—losses sustained from ordinary operations of war, the whole burden of which the belligerent seeks, now that the contest is at an end, to transfer to a neutral nation. It can hardly be doubtful that these would have been in great measure averted, if the naval resources of the United States had, at the time, been employed with reasonable activity for the purpose.[2]

122. It is not, then, without reason that the British government has, in the concluding paragraphs of its Counter Case, described the claims which the tribunal is asked to sanction by its award as of grave and serious consequence to all neutral nations. In truth, it is not too much to say that, were they to be affirmed as the United States have presented them, and were the principles on which they have been framed and argued to obtain general acceptance, the situation of neutral powers would be entirely altered, and neutrality would become an onerous and, to the less powerful states, (such, especially, as cherish the freedom of commerce and have free institutions,) an almost impossible condition. It is the interest of all nations that the recognized duties of neutrality should be discharged with good faith and reasonable care; and Great Britain requires of others in this respect nothing which she is not ready to acknowledge herself equally bound to perform. But it is likewise the interest of all nations, and in a still higher degree, that these duties should be as little burdensome as possible. Conclusion.

123. The question submitted to the tribunal is not whether the subordinate officials of the British government, or even the government itself, might or might not, on some occasions during the war, have acted with greater dispatch or with better judgment. Nor has it to

[1] British Counter Case, p. 140.

[2] Ibid., part X, pp. 138-140.

determine whether it would be for the advantage of the world that rules of action which have not been recognized in past time should be established for the future. These are matters of opinion which Great Britain would not have consented to refer to arbitrators. The question for decision is a question of positive duty and liability, to be determined solely by the application of accepted rules and settled principles to ascertained facts. And no award can with justice be made against Great Britain to which the United States, or Italy, or Switzerland, or Brazil, or any other power, under similar circumstances, would be justly unwilling to submit.

ANNEX (A.)—COMMUNICATIONS BETWEEN THE BRITISH AND AMERICAN GOVERNMENTS, DURING THE CIVIL WAR, WITH REFERENCE TO THE STATE OF THE NEUTRALITY LAWS OF GREAT BRITAIN.

In addition to the Annex (B) to the British Counter Case, it is thought desirable here to exhibit, in one view, the effect of every material communication which passed during the war between the British and American governments with reference to the state of the neutrality laws of Great Britain. It will be seen (1) that the equal efficacy of the provisions of the British foreign-enlistment act with those of the American act of the 20th April, 1818, was never during that period seriously called in question, and (2) that the only additional legislation then solicited from Great Britain by the United States was of a different kind, with a view either to the prevention of the trade in articles contraband of war between Great Britain or her colonies and the Confederate States, or to the more effectual repression of acts inconsistent with neutrality in the British North American possessions, conterminous with the United States.

On the 28th June, 1861, Mr. Seward wrote thus to Mr. Adams:

As it is understood that there is an act of the British Parliament *similar to our act of neutrality of the 20th April*, 1818, I have to request that, if any infringement of the British act adverse to the rights of this Government should come to your knowledge, you will cause complaint thereof to be made, in order that the parties implicated may be prosecuted according to law.[1]

On the 7th September, 1861, Mr. Seward instructed Mr. Adams to remind Lord Russell of an act of Congress passed in 1838, during an insurrection against the British authority in Canada, adding:

The British government will judge for itself whether it is suggestive of any measures on the part of Great Britain that might tend to preserve the peace of the two countries, and, through that way, the peace of all nations.[2]

On the 10th of the same month he forwarded to Mr. Adams an intercepted letter relative to the shipment of arms and powder from Nausau for the use of the confederates, and said:

The existing British statute for the prevention of the armed expeditions against countries at peace with Great Britain is understood to be similar to our act of Congress of the 5th of April, 1818. Proceedings like that referred to in the letter of Baldwin, however, afford us special reason to expect legislation on the part of the British Government, of the character of our act of 1838. It may be, however, that the British Government now has the power to prevent the exportation of contraband of war from British colonies near the United States, for the use of the insurgents in the South.[3]

On the 11th and the 14th of September, 1861, Mr. Seward expressed his regret that the British laws were not effectual to repress this description of trade. At a much later date, (24th October, 1864,) recurring to the same suggestion, he wrote:

The insufficiency of the British neutrality act and of the warnings of the Queen's proclamation, to arrest the causes of complaint referred to, were anticipated early in the existing struggle; and that Government was asked to apply a remedy by passing

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[1] Appendix to Case of the United States, vol. i, p. 517.
[2] Ibid., p. 660.
[3] Ibid., p. 518. See also Mr. Adams's letter of May 12, 1862; ibid., pp. 663, 664.

an act more stringent in its character, such as ours of the 10th March, 1838, which was occasioned by a similar condition of affairs. This request has not been complied with, though its reasonableness and necessity have been shown by subsequent events.[1]

The act of Congress of 1838, thus referred to, was a temporary statute, (of two years' duration,) by which power was given to the officers of the United States Government "to seize or detain any vessel, or any arms or munitions of war, which might be provided or prepared for any military expedition or enterprise *against the territory or dominions of any foreign prince or state, &c., conterminous with the United States,* and with whom they were at peace, *contrary to the sixth section of the act of the 20th April,* 1818," and "to seize any vessel or vehicle, and all arms or munitions of war, *about to pass the frontier of the United States for any place within any foreign state, &c., conterminous with the United States,* where the character of the vessel or vehicle, and the quantity of arms and munitions, or other circumstances, should furnish probable cause or believe that the vessel or vehicle, arms or munitions of war, were intended to be employed by the owner or owners thereof, or any other person with his or their privity, in carrying on any military expedition or operations *within the territory or dominions of any foreign prince, &c., conterminous with the United States,*" suitable provisions being made for the trial, in due course of law, of the legality of all such seizures. These powers (limited, as they were, to operations illegal under the act of 20th April, 1818, of which the destination should be some territory conterminous with the United States) were still further guarded and limited by the following proviso:

Provided, That nothing in this act contained shall be construed to extend to, or interfere with, any trade in arms or munitions of war, conducted in vessels by sea, with any foreign port or place whatever, or with any other trade which might have been lawfully carried on before the passage of this act, under the law of nations, and the provisions of the act hereby amended.

If a law substantially similar to this had been enacted in Great Britain, it would have been wholly inapplicable to the trade by sea in articles contraband of war, for the repression of which its enactment was suggested by Mr. Seward. Its efficacy would have been confined to such acts, hostile to the United States, as might be attempted in the British possessions conterminous with those States. Such a law was, in point of fact, enacted by the Canadian Legislature as soon as acts of that nature were attempted by the Confederates in the British North American provinces; and Her Majesty's Government has no reason to suppose that the measures then taken to preserve from violation the neutrality of Her Majesty's North American possessions were deemed unsatisfactory, or insufficient to meet that emergency, by the Government of the United States.

Of the correspondence which took place between December, 1862, and March, 1863, when Her Majesty's Government invited, from Mr. Adams, suggestions with a view to concurrent amendments in the Foreign-Enlistment Acts of both countries, (which suggestions were met by an invitation from the United States to Her Majesty's Government to make propositions for that purpose, it being at the same time expressly stated that the Government of the United States considered their own law "as of very sufficient vigor," or, as Earl Russell understood Mr. Adams to say, that "they did not see how their own law on this subject could be improved,")[2] and the opinion then formed and announced to Mr. Adams by

[1] Appendix to Case of the United States, vol. i, p. 677.
[2] Appendix to the Case of the United States, vol. i, pp. 668, 669; also, pp. 585 and 602.

the British Government, (on which they always afterward acted,) that the British law was also sufficient for its intended purpose, in all cases in which the necessary evidence of the facts could be obtained, a sufficient account has been given in the Annex (B) to the British Counter Case.

The reply of Mr. Seward, (2d March, 1863,) when informed of the conclusion thus arrived at by the Cabinet, has been referred to in an earlier portion of this argument. "It remains," he said, "for this Government only to say, that it will be your duty to urge upon Her Majesty's Government the desire and expectation of the President, that henceforward Her Majesty's Government will take the necessary measures to enforce the execution of the law *as faithfully as this Government has executed the corresponding statutes of the United States.*"[1] The substantial agreement of the provisions of the British law with the law of the United States, on this subject, was repeatedly afterward admitted and referred to.

On the 9th April, 1863, Mr. Dayton wrote from Paris to Mr. Seward: "I told M. Drouyn de Lhuys *our Foreign-Enlistment Act was the same as that of England;*"[2] to which Mr. Seward replied, (24th April, 1863:) "You have done the country a good service in explaining, in your conversations with M. Drouyn de Lhuys, the manner in which we have heretofore maintained our neutrality in foreign wars, *by enforcing our enlistment laws, which are in all respects the same as those of Great Britain.*"[3]

On the 11th July, 1863, (after the trial of the Alexandra, and with reference to the view of the British Foreign-Enlistment Act, then taken by the Lord Chief Baron Pollock—a view in which Her Majesty's Government never acquiesced, and on which they never afterward acted,) Mr. Seward wrote:

> I may safely protest, on behalf of the United States, against the assumption of that position by the British nation, because this Government, *with a Statute exactly similar to that of Great Britain*, does constantly hold itself able and bound to prevent such injuries to Great Britain. The President thinks it not improper to suggest, for the consideration of Her Majesty's Government, the question whether, on appeal to be made by them, Parliament might not think it just and expedient to amend the existing Statute in such a way as to effect what the two Governments actually believe it ought now to accomplish. In case of such an appeal, the President would not hesitate to apply to Congress for an equivalent amendment of the laws of the United States, if Her Majesty's Government should desire such a proceeding, *although here such an amendment is not deemed necessary.*[4]

On the 10th September, 1863, Mr. Adams reported to Mr. Seward, with expressions of much satisfaction, a speech then recently made by Earl Russell at Dundee:

> You will not fail to observe the greatly increased firmness of his language; and more especially his intimation that *new powers may be solicited from Parliament, if those now held should prove insufficient. This is, at least, the true tone.*[5]

On the 16th of the same month, Mr. Adams (with reference to the iron-clad rams at Birkenhead, which were soon afterward seized by Her Majesty's Government) wrote to Earl Russell:

> Your Lordship will permit me to remind you that Her Majesty's Government cannot justly plead the inefficiency of the provisions of the Enlistment law to enforce the duties of neutrality in the present emergency as depriving them of the power to prevent the anticipated danger. It will doubtless be remembered that the proposition made by you, and which I have had the honor of being the medium of conveying to my Government, to agree upon some forms of amendment of the respective Statutes

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[1] Appendix to the Case of the United States, vol. i, p. 669.
[2] Ibid., p. 587.
[3] Ibid., p. 262.
[4] Ibid., p. 670.
[5] Ibid., p. 673.

of the two countries, in order to make them more effective, was entertained by the latter, *not from any want of confidence in the ability to enforce the existing Statute*, but from a desire to co-operate with what then appeared to be the wish of Her Majesty's Ministers. But, upon my communicating this reply to your Lordship and inviting the discussion of propositions, you then informed me that it had been decided not to proceed any further in this direction, as it was the opinion of the Cabinet, sustained by the authority of the Lord Chancellor, that the law was fully effective in its present shape.[1]

There were other parts of the letters (not necessary to be further alluded to) which led Earl Russell to reply in the following terms, (September, 25, 1863:)

There are passages in your letter of the 16th, as well as in some of your former ones, which so plainly and repeatedly imply an intimation of hostile proceeding toward Great Britain on the part of the Government of the United States, unless steps are taken by Her Majesty's Government which the law does not authorize, or, unless the law, which you consider as insufficient, is altered, that I deem it incumbent upon me, in behalf of Her Majesty's Government, frankly to state to you that Her Majesty's Government will not be induced by any such consideration either to overstep the limits of the law or to propose to Parliament any new law, which they may not, for reasons of their own, think proper to be adopted. They will not shrink from any consequences of such a decision.[2]

To which Mr. Adams, on the 29th September, 1864, rejoined:

I must pray your Lordship's pardon if I confess myself at a loss to perceive what portions of my late correspondence could justify the implications to which you refer. So far from intimating "hostile proceedings toward Great Britain, unless the law, which I consider as insufficient, is altered," *the burden of my argument was to urge a reliance upon the law as sufficient, as well from the past experience of the United States as from the confidence expressed in it by the most eminent authority in this kingdom.*[3]

In November and December, 1863, dangers on the side of Canada led to a revival of the question, whether some legislation, similar to that of the United States in 1838, might not be useful for the prevention of those dangers;[4] and a law for that purpose was soon after enacted by the Canadian Parliament, as has been already mentioned.

Nothing further passed upon this subject between the two Governments before the conclusion of the war.

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[1] Appendix to Case of the United States, vol. i, p. 673.
[2] Ibid., p. 674.
[3] Ibid., p. 675.
[4] Ibid., pp. 675, 676.

ANNEX (B.)—FRENCH TRANSLATION OF THE THREE RULES IN ARTICLE VI OF THE TREATY OF WASHINGTON.

The French Translations, both of the Case of Her Majesty's Government and of the Case of the United States, (unofficially provided for the convenience of the Arbitrators,) have given the text of the three Rules in Article VI of the Treaty, with some variations of rendering, which (unless corrected) might possibly give occasion to misconceptions of the exact sense of parts of those Rules. It has, therefore, been thought expedient here to subjoin, in parallel columns, an accurate copy of the original English text and a revised French Translation:

RULES.	RÈGLES.
A neutral Government is bound— First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use. Secondly. Not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men. Thirdly. To exercise due diligence in its own ports and waters, and, as to all persons within its jurisdiction, to prevent any violation of the foregoing obligations and duties.	Un Gouvernement neutre est tenu— 1. De faire les dues diligences pour prévenir la mise en état, l'armement en guerre ou l'équipement, dans sa juridiction, de tout vaisseau qu'il est raisonnablement fondé à croire destiné à croiser ou à faire la guerre contre une puissance avec laquelle ce Gouvernement est en paix; et de faire aussi même diligence pour empêcher le départ hors de sa juridiction de tout navire destiné à croiser ou à faire la guerre, comme il est dit ci-dessus, ce navire ayant été spécialement adapté, en tout ou en partie, dans les limites de sa dite juridiction, à des usages belligérants. 2. De ne permettre ni souffrir que l'un des belligérants fasse usage de ses ports ou de ses eaux comme d'une base d'opérations navales contre l'autre, ni pour renouveler ou augmenter ses munitions militaires ou son armement, ou s'y procurer des recrues. 3. D'exercer les dues diligences dans ses propres ports et eaux, et à l'égard de toutes personnes dans les limites de sa juridiction, afin d'empêcher toute violation des obligations et devoirs précédents.

The following is the translation, above referred to, of the Rules, as stated in the American Case, printed in parallel columns with a second translation, which will be found at page 513 of the first Part of the "Choix de Pièces Justificatives," furnished by the United States:

Translation taken from the Case of the United States.	*Translation taken from the "Choix de Pièces Justificatives" of the United States.*
RÈGLES.	RÈGLES.
Un Gouvernement neutre est obligé— 1. À faire toutes les diligences nécessaires pour s'opposer dans les limites de sa juridiction territoriale à ce qu'un vaisseau soit mis en mesure de prendre la mer, à ce qu'il soit armé ou équipé, quand ce Gouvernement a des motifs suffisants pour pen-	Un Gouvernement neutre est tenu— Premièrement. De faire toutes les diligences nécessaries pour éviter qu'il soit armé ou équipé, dans sa juridiction, aucun vaisseau qu'il serait fondé à croire disposé à croiser ou à faire la guerre contre une puissance avec laquelle il est en paix; et

ser que ce vaisseau est destiné à croiser ou à faire des actes de guerre contre une puissance avec laquelle il est lui-même en paix. Ce Gouvernement doit faire également toutes les diligences nécessaires pour s'opposer à ce qu'un vaisseau destiné à croiser ou à faire des actes de guerre, comme il est dit ci-dessus, quitte les limites de sa juridiction territoriale dans le cas où il y aurait été spécialément adapté, soit en totalité, soit en partie, à des usages belligérants.

2. Un gouvernement neutre ne doit ni permettre ni tolérer que l'un des belligérants se serve de ses ports ou de ses eaux comme d'une base d'opération navale contre un autrebelligérant; il ne doit ni permettre ni tolérer non plus que l'un des belligérants renouvelle ou augmente ses approvisionnements militaires, qu'il se procure des armes ou bien encore qu'il recrute des hommes.

3. Un Gouvernement neutre est obligé de faire toutes les diligences requises dans ses ports et dans ses eaux, en vue de prévenir toute violation des obligations et devoirs ci-dessus énoncés; il agira de même à l'égard de toutes les personnes qui se trouvent dans sa juridiction.

d'user de la même diligence pour empêcher que des vaisseaux destinés à croiser ou à faire la guerre, comme il est dit ci-dessus, sortent de sa juridiction, s'ils y ont été, en tout ou partie, adaptés spécialement à l'usage de la guerre.

Secondement. Il est tenu de ne permettre ni souffrir qu'aucun des belligérants se serve de ses ports ou de ses eaux pour en faire la base d'opérations navales contre l'autre, ou dans le but soit de renouveler ou augmenter les approvisionnements militaires ou les armes, soit de recruter des hommes.

Troisièmement. D'exercer la surveillance nécessaire dans ses propres ports et dans ses eaux, comme aussi sur tout individu dans sa juridiction, pour prévenir toute violation des obligations et des droits qui précèdent.

ANNEX C.—REPORT OF THE COMMITTEE APPOINTED BY THE BOARD OF TRADE.

In accordance with the request of the Board of Trade, we have examined the Revised List of Claims presented by the United States Agent on the 15th of April last, and have to offer the following observations on them in continuation of our First Report:

The aggregate amount of claims contained in the Revised Statement is $25,547,161. It is composed of a claim of $5,808,066, for increased insurance premiums; a claim of $479,033, which is styled "miscellaneous;" and a claim of $19,260,062, for losses sustained in respect of the vessels destroyed by the cruisers.

As regards the claim for "increased insurance premiums," it is a claim for alleged indirect losses, with which we have no concern. It may not, however, be unworthy of notice that the claim has been increased from $1,120,795, in the Former Statement, to $5,808,066 in the Revised Statement, between the respective dates of the 4th of October and the 15th of March.

As regards the before-mentioned "miscellaneous" claim, it is to be found at p. 290 of the Revised Statement, and consists of the following items:

1. A claim of $11,788, which is described as follows: "For detention of ship at Philadelphia, unable to procure freight by reason of the depredations of the Alabama and other insurgent cruisers."
2. A claim of $15,761 for the detention of another ship, which is described in exactly the same way as the last claim.
3. A claim of $55,000 "for loss of vessel captured by insurgent cruisers V. H. Joy and Music (sailing under letters of marque) near the mouth of the Mississippi."
4. A claim of $95,000 "for expenses and loss on account of the breaking up of the regular voyage of the bark Almina, the ship Daylight, and the ship Julia G. Tyler."
5. A claim of $300,032 for damages, breaking up business of "dispatch-line of China packets."
6. A claim of $1,452 by John Burns, Manchester, England, for his deceased son Joseph Burns, "for loss of one hundred and eightieth share in catchings of the whale-ship Hedaspe, of New Bedford, which he (the claimant) states was sunk by the Alabama with all hands on board."

As regards the first, second, fourth, and fifth of these claims, it is manifest at once, from the above-mentioned description of them, taken from the Statement itself, not merely that the damages, which are not and cannot be attributed in any definite degree to any one or more of the Confederate cruisers, are of far too remote a character to be allowed, but also that these claims are, from their very nature, entirely and essentially claims for *indirect* losses, with which we have nothing to do.

As regards the third claim, there is no doubt that it must have been inadvertently inserted, for the cruisers V. H. Joy and Music therein referred to are not comprised in the list of cruisers mentioned in the United States Case or Counter Case, and are not stated to have been in any way connected with any act or default on the part of the British Government.[1]

[1] The same consideration affects the claims connected with the cruisers Boston and Sallie in the "Former Statement," (see p. 63.)

As regards the claim by John Burns for his deceased son Joseph Burns, it will be enough to observe, in the first place, that it is apparently advanced by a British subject; in the second place, that, considering the nature, variety, and extent of the demands generally put forward, one can scarcely doubt that, if the whale-ship Hedaspe had been in fact destroyed by the Alabama, there would have been other claims advanced, besides one for the loss of only the one hundred and eightieth share in the catchings of the vessel; and, in the third place, that the claim is as remarkable for the absence of all material particulars in the statement, as it is for the improbability of the fact on which it is alleged to have been founded.

For these reasons we are of opinion that the whole of this "miscellaneous" claim of $479,033 must undoubtedly be rejected.

There remains then to consider the claim of $19,260,062.

This amount exceeds the corresponding sum in the Statement on which we have already reported by $1,359,429, *the excess being due partly to claims in respect of vessels not claimed for nor mentioned in the Former Statement, and partly to additional claims being put forward in respect of vessels mentioned in that Statement.*

Before, however, analyzing this excess, and stating the result at which we have arrived, it will be useful to make some observations which present themselves on comparing, with the Revised Statement, the Original List of claims which was sent by Mr. Seward to Mr. Adams in August 1866, and also the extension of this, as presented by the President to the House of Representatives in April, 1869, and which are to be found in the fourth volume of "the Correspondence concerning Claims against Great Britain transmitted to the Senate of the United States."

These lists of claims not only strongly confirm the opinion we expressed in our First Report, that the estimate we there made of the value of the vessels was probably a very liberal one, but also show in a remarkable manner how since the year 1866 the claimants have in most cases enormously increased their estimate of the losses alleged to have been sustained by them.

We will cite some of the more striking instances, calling the list of claims sent to Mr. Adams the "Original List," the list presented to the House of Representatives, the "United States Amended List," the Statement on which we have already reported the "Former Statement," and the revised list of claims on which we are now reporting "the Revised Statement."

The Alert.—The claim as stated in the "Original List" amounted to $57,859; in the "Revised Statement" (p. 1) it amounts to $202,726. In the "Original List" there was a claim of $30,000 for "*interruption of voyage;*" but now, in addition to that amount, there is claimed a sum of $144,869 for "*prospective earnings.*"

The Anna Schmidt.—This vessel was in the "Original List" valued at $30,000, which is somewhat less than the average valuation we have allowed in proportion to her tonnage, but in the "Revised Statement" (p. 13) the sum claimed in respect of the *vessel* is double that amount.

The Golden Eagle.—In the "Original List" the owners claimed for the *vessel* $36,000, and for *freight* $26,000. Our average estimate in proportion to her tonnage was about $45,000. In the "Revised Statement" (p. 40) the owners claim $86,000 for *vessel and freight*, thus increasing their claim by nearly 50 per cent.

The Highlander.—She was a vessel of 1,049 tons, and was in ballast. In the "Original List" two insurance companies advanced claims for insurances to the extent of $30,000, which was probably about the value

of the vessel, but in the "Revised Statement" (p. 46) the owners put forward an additional claim for the ship to the extent of $84,000. This claim is, however, far less extravagant than the claim for freight, which in the "Original List" amounted to $6,000; whereas in the "Revised Statement" it exceeds $68,000, and is advanced without any deduction whatever, although the ship was in ballast at the time of her capture. It will be found that at pages 6 and 27 of our first report we have specially commented on the character and extent of the extraordinary demands put forward in respect of this vessel.

The Ocean Rover.—In the "Original List" the owners claimed $10,400 for *value of ship, loss of oil on board, and damages for breaking up of voyage.* The claims now advanced in the "Revised Statement" (p. 68) in respect of the same losses exceed $193,000, the difference between the original claim and the more recent one being made up entirely of "*double claims for single losses.*"

The Kate Cory.—In the "Original List" the owners claimed $27,800 for the value of *the brig, outfit, and oil on board*, and there was also a claim of $1,820 for the value of "reasonable prospective catch of oil." In the "Revised Statement" (p. 51) the amounts insured have, as usual, been added to the claims by the owners, and there has been inserted a claim of $19,293 for loss of "*prospective catch*," so that the original claim for $29,620 has grown to $56,474.

The Lafayette, No. 2.—In the "Original List" the owners valued the ship and outfit at $24,000, which is less than our average valuation according to her tonnage; and the secured earnings at $10,475; but in the "Revised Statement" (p. 55) the claim put forward in respect of *ship and outfit and secured earnings* is more than $89,000; and the *prospective earnings* which were in the "Original List" valued at $33,446, are now estimated at a sum exceeding $50,000. The original claim for $69,471 has grown to $141,858.

The Rockingham.—The claim in the "Original List" amounted to $105,000, whereas the claim in the "Revised Statement" (p. 74) exceeds $225,000. This is also one of the vessels which we selected in our first report (page 23) as a striking example of the exorbitant nature of some of the claims. There can be no doubt that the original claim was very extravagant, but in the "Revised Statement" it has been doubled by improperly adding the insurances to the alleged values.

The Union Jack.—In the "Original List" it is stated that G. Potter, *after deducting the amount* received from the Atlantic Insurance Company, claims the sum of $7,584; but in the "Revised Statement" (page 111) he claims the sum of $34,526 *without making any deduction* for insurances, although the insurance companies at the same time claim $32,014 in respect of the amount insured by them; and it therefore clearly follows that a sum, at any rate exceeding $26,000, is claimed twice over.

The Catherine.—In the "Original List" the owners claimed about $45,000 for *vessel and secured earnings*, but made no claim in respect of *prospective earnings.* Now in the Revised Statement (p. 229) there is a claim put forward of $35,829 for loss of *vessel and cargo*, over and above $31,676, the alleged amount of insurances by the owners, which is also at the same time claimed by the insurance company. In addition to this there is a claim for *prospective earnings* exceeding $19,600, so that the original claim of $45,805 has now grown to the enormous sum of $272,108.

The Favorite.—She was a bark of 393 tons. In the "Original List" the Atlantic Insurance Company, as insurers and assignees of the owners,

claimed for loss on *vessel and outfit* $40,000, which there can be little doubt was the full value. In the "Revised Statement" (p. 240) the claims in respect of the *vessel and outfit* amount altogether to $110,000. The master in the "Original List" claimed $1,498 for the *loss of his effects;* but now he claims for the *loss of his personal property*, $2,239, and *for loss of interest in oil and bone* $2,709.

The Isaac Howland.—In the "Original List" the claim for *prospective earnings* was $53,075, but in the "Revised Statement" (p. 247) it has grown to nearly four times that sum, namely to $196,158. Moreover in the "Original List" the owners claimed $65,000 for ship and outfit, *subject to abatement for insurance;* whereas in the "Revised Statement" they claim the same sum, but *protest against any diminution of claim by reason of insurance obtained by them*, although the insurance companies claim at the same time the whole amount insured by them.

The General Williams.—In the "Original List" the owners claimed $40,503 as *damages by the destruction of the vessel*, over and above $44,673, the amount of insurances received by them. In the "Revised Statement" (p. 241) there is added to the amount of insurances a sum of $85,177, the claim being in this manner all but doubled. There are also added the following claims: A claim by the owners for "*prospective earnings* amounting to $196,807; a claim by the master for loss of "*prospective catch, time, and occupation*," amounting to $20,000; a similar claim by the mate, amounting to $10,000; another claim of $30,000, for *insurances on vessel and outfit;* and, finally, the sum of $16,000 for *insurances by the owners on the vessel's prospective earnings.* In this manner the original claim, which was less than $66,000, has grown to the sum of $406,934, and has therefore been increased more than sixfold.

The instances we have given are sufficient to indicate that, since the year 1866, the owners have, to a very remarkable extent, raised their demands in respect of the vessels and their earnings; but the table (No. 1) appended to this report, which exhibits the amounts claimed in 1866 in the "Original List;" those claimed in 1869 in "the List presented to the United States House of Representatives;" those comprised in the "Former Statement" of November, 1871; and those claimed in the Revised Statement of March, 1872, will show, in a far more striking manner, to what an enormous extent almost every claim has grown at each of these successive stages.

After these preliminary observations, we proceed to analyze the revised claim of $19,260,062; and, following the plan adopted at page 13 of our first report, we begin by directing attention to and correcting some mistakes or errors which appear to have crept into the figures in the "Revised Statement," as they had done in the former statement.

The following have the effect of improperly diminishing the claim, and require its total amount to be increased:

Commonwealth.—The addition of the items (page131–137) gives	$453,645	
The amount claimed in the Summary (page 337) is.....	452,042	
Thus giving a difference, which has to be added, of		$1,603
Corriss Ann.—The addition of the items (page 147) gives.....	25,400	
The total amount of the claim is, however, stated at.....	25,000	
Thus giving a difference, which has to be added, of		400
Morning Star.—In the Revised Statement, page 64, the claim advanced is $5,614.40, *gold*, whereas on the statement on which we have reported it was $7,744, *currency*, thus giving rise to an apparent difference of $2,129.60. But, for the purpose of comparing the two statements with one another, it will be proper to keep the amount in currency, and therefore necessary to add.....		2,130
Therefore the total sum to be added is.....		4,133

On the other hand, the following errors have the effect of improperly increasing the claim, and require its total amount to be reduced:

Courser.—The addition of the items (page 31) gives	$32,307	
The amount claimed in the Summary (page 336) is	33,307	
Thus giving a difference, which has to be deducted, of		$1,000
Levi Starbuck.—(Page 59.) In this claim there is an error to the amount of $23,350 of the strangest character. After the claim by the owners there is inserted a memorandum that the insurances effected amounted to $23,350; a memorandum which was indeed not necessary, inasmuch as that same amount is claimed by three insurance companies; yet that sum of $23,350, (so referred to in the memorandum,) as well as the like amount claimed by the insurance companies, is made to form part of the total claim. This strange mistake must, of course, be corrected by deducting the sum of		23,350
Ocean River.—(Page 68.) An exactly similar mistake to that which we have just noted presents itself in this case. The sum of $24,710, which is referred to as "the amount of the insurances" being added, although the same amount is claimed by the insurance companies. We have, therefore, to deduct the sum of		24,710
Sea Lark.—(Page 78.) An exactly similar mistake of adding to the amounts claimed by the insurance companies the sums mentioned by the owners as "the amounts of the insurances" presents itself in this case, and renders necessary a deduction of[1]		7,980
Union Jack.—The addition of the items (page 110) gives	172,175	
The amount claimed in the Summary (page 336) is	172,235	
Thus giving a difference, which has to be deducted, of		60
Crown Point.—The addition of the items (page 148) gives	417,903	
The amount claimed in the summary (page 337) is	417,913	
Thus giving a difference, which has to be added, of		10
M. J. Colcord.—(Page 186.) There is an error in addition (which we notice only for the purpose of keeping our figures accurate) amounting to		1
To these errors have to be added those adverted to at page 13 of our former report, which have not been corrected, viz, those occurring in the cases of the General Williams, Gypsy, and Pearl, which errors are repeated in the "Revised Statement," and amount to		123,346
These errors require, therefore, the claim to be altogether reduced by the sum of		180,457
We have, therefore, to deduct the last-mentioned amount from, and to add the before-mentioned sum of $4,133 to $19,260,062, which is the total amount of the claims in the "Revised Statement," exclusive of the claims styled "miscellaneous," and those for "increased insurance premiums." Having made the necessary subtraction and addition, we arrive at the corrected amount of		$19,083,738
As compared with the corrected amount of the claim in the "Former Statement," as ascertained at page 13 of our first report		17,763,910
Showing therefore an increase of claim in the "Revised Statement," amounting to		1,319,828

Adopting, as in our first report, the classes A, B, C, D, E, F, which we there defined, and under which we arranged the various vessels, the corrected amounts of claims in the "Former" and in the "Revised

[1] In the "former statement," although there were the same memoranda in the cases of the Levi Starbuck, Ocean Rover, and Sea Lark as there are in the "Revised Statement," the errors above pointed out were not made.

Statements" respectively, together with the *increase of claim* in the latter statement, may be exhibited in the following form:

	Corrected amount of claim under Revised Statement.	Corrected amount of claim under Former Statement.	Increase of claim in Revised Statement.
A	$8,147,362	$8,073,810	$73,552
B	3,107,142	2,867,619	239,523
C	6,436,922	5,794,687	642,235
D	887,831	730,959	156,872
E, F	504,481	296,835	207,646
	19,083,738	17,763,910	1,319,828

It is, however, to be observed that in order to ascertain the amount of the *additional* claims actually advanced in the "Revised Statement," we must take into account the fact that in this statement the claims in respect of four vessels have been withdrawn, and those in respect of three others have been reduced. In these cases, namely, of four of the eight bonded whalers, (belonging to Class A,) captured by the Shenandoah, the claims comprised in the "Former Statement," amounting to $208,996, have been entirely withdrawn; in the case of the Altamaha, (belonging to Class A,) captured by the Alabama, the claim has been reduced by $15,450; in that of the Avon, (belonging to Class B,) captured by the Florida, the claim has been reduced by $67,000; and, finally, in the case of the Emma Jane, (belonging to Class D,) captured by the Alabama, the claim has been reduced by $9,000.

In order, then, to determine the amount of the *additional claims* comprised in the "Revised Statement," we must evidently deduct the above sums from the claims made in the former statement, before comparing them with those in the Revised Statement, and in this manner it can be shown that the *additional claims* may be exhibited in reference to their amount and distribution in the following table:

In reference to classes.		In reference to cruisers.		In reference to interests.	
A	$297,999	Alabama	$440,989	Vessels and insurances on do	$648,898
B	306,522	Florida	455,811	Freight and insurances on do	140,082
C	642,235	Tacony	63,892	Secured prospective earnings and insurances	181,103
D	165,872	Clarence	39,622	Cargo and insurances on do	473,830
E, F	207,646	Georgia	32,184	Personal effects	78,478
		Chickamauga	87,416	Damages	97,883
		Shenandoah	145,141		
		Tallahassee	150,846		
		Retribution	8,683		
		Nashville	38,897		
		Jeff. Davis	7,752		
		Sumter	149,041		
	1,620,274		1,620,274		1,620,274

We now proceed to consider the amounts of the additional claims as stated and arranged in the first column.

CLASS A.

There is one alteration in the "Revised Statement" of some importance which we have already referred to. In the claim in respect to the Altamaha, (which will be found commented on at page 19 of our first report as one manifestly extravagant,) in addition to the claim by the owner of $12,000 for the brig and her outfit, there was a claim in respect of the brig advanced by "an agent" amounting to $15,450. This latter claim has been withdrawn, so that the total claim in the "Revised Statement" is reduced by that amount, and the sum now claimed for the vessel and her outfit is $12,000, which is only $100 more than our allowance of $100 per ton would give.

In the "Former Statement" the claims in this class were:

In respect of 41 whalers, amounting to	$7,435,743	
In respect of 6 fishing-vessels, amounting to	42,360	
In respect of 8 whalers "bonded" or detained, amounting to	595,747	
Therefore the total claim in the "Former Statement" amounted to		$8,073,810
But there have been withdrawn the claims for 4 out of the 8 "bonded" whalers, amounting together to	208,996	
And the claim in respect of the Altamaha has been reduced by	15,450	
Leaving therefore the amount of		$7,849,364
Which amount has to be compared with the corrected amount of the claims in Class A, contained in the "Revised Statement," that is to say, with		$8,147,363
Therefore the total amount of the aditional claims in Class A, contained in the Revised Statement, amounts to		$297,999
These additional claims consist of—		
New Claims, that is claims in respect of vessels *not* mentioned in the Former Statement, amounting to		$30,205
And		
Further Claims, that is, claims in respect of vessels which *are* mentioned in the Former Statement, viz:		
(*a*) For vessels and outfits	8,263	
(*b*) For secured earnings	30,789	
(*c*) For prospective earnings	150,314	
(*d*) For damages	55,200	
(*e*) For personal effects	23,228	
		267,794
Giving as before a total of		297,999

I. As regards the *Further Claims*. In our First Report on Class A we fully provided for all losses sustained in respect of the *vessels and outfits, their secured and prospective earnings* (*a*, *b*, *c*.) We therefore see no reason why any allowance should be made on account of these *Further Claims*, but it may be worth while to observe that so far as they relate to the vessels, they can almost all be proved to arise from insurance companies and the owners simultaneously putting forward claims for the same sums; that the additional claims for *prospective earnings* are advanced by three vessels, the La Fayette, Catherine, General Williams, for the *prospective earnings* of which enormous sums were already claimed in the "Former Statement," and which will be found specially referred

to at pages 317 and 318 of this Report, as illustrating the remarkable extent to which the owners have increased their claims since the year 1866.

The item of $55,200 for *damages* comprises claims for *loss of time, wages, and occupation.* These must, for reasons stated in our First Report, be disallowed, but it may nevertheless be useful to cite some instances in order to show the nature and extent of the claims advanced under this head.

The Master of the Edward Carey claims $10,000 as damages for loss of *time and occupation;* the Mate of the Pearl and a Cooper on board the same vessel claim respectively $5,000 and $1,200 for loss of time; the Mate of the Levi Starbuck claims $9,000 for loss of time.

As regards the claim of $23,228 for loss of *personal effects*, by far the greater part, namely, $18,346 is advanced in respect of losses occasioned by the captures made by the Shenandoah. It will be found in our First Report on Class A that we considered the claims for loss of personal effects occasioned by the captures made by the Shenandoah to be very extravagant, and that we consequently made a ratable allowance for these claims, while we passed those in respect of vessels captured by the other cruisers. We see no reason for allowing anything more for *personal effects* alleged to be lost by reason of captures by the Shenandoah; but to show the exorbitant nature of the additional claims of $18,346 we will mention that the Master of the Catherine claims $3,625; the First Mate of the Isaac Howland claims $3,227; and the Master of the Pearl claims $5,350.

With respect to the *further* claims for *personal effects* in the cases of the other whalers we propose to pass them, with the exception of those by the Master and Mate of the Nye, (a vessel of 211 tons,) amounting together to $2,023. We think that $750 will be an ample allowance for these two claims. These considerations will give $3,609 as the total allowance in respect of the *Further Claims* for *personal effects.*

II. As regards the *New Claims*, that is, claims in respect of vessels not mentioned in the "Revised Statement." These consist of four fishing-vessels, alleged to have been destroyed by the Tallahassee, viz: the Etta Caroline of 39 tons, (p. 280 of the "Revised Statement,") the Floral Wreath of 54 tons, (p. 281,) the Magnolia of 36 tons, (p. 285,) and the Pearl of 43 tons (p. 286,) and two fishing-vessels, the Ripple of 64 tons, (p. 210,) and the Archer of 62 tons, (p. 207,) the former of which is stated to have been destroyed by the Tacony, and the latter of which is alleged to have been detained by the same cruiser and to have *lost her outfit.*

In respect of the first four *fishing-vessels* destroyed by the Tallahassee the claims for the value of the *vessels* amounts to $16,200, and the claim for *secured earnings* to $900. We propose to allow this last claim of $900 and the claim of $2,700, the alleged value of the Magnolia and Pearl,[1] and, estimating the value of the Etta Caroline and Floral Wreath at the rate of $50 per ton, in accordance with our First Report on Class A, to allow for their values $4,650, so that our proposed allowances in respect of the four fishing-vessels destroyed by the Tallahassee amount altogether to $8,250, whereas the claim amounts to $17,100.

As regards the Ripple and the Archer, the two fishing-vessels captured by the Tacony, the claim in the "Revised Statement" in respect of the former for *vessel and catchings on board* is $8,805, that in respect

[1] This vessel Pearl is a different vessel from that referred to above; the claim in respect of the former, which is a small fishing-vessel, is at page 286, and the claim in respect of the latter, which is a bark, is at p. 259.

of the Archer for *outfits lost* is $2,500, and for *loss of time* $1,800, so that the total claim in respect of these two fishing-vessels is $13,105.

In accordance with our First Report on Class A we propose to allow for the value of the Ripple and her outfit at the rate of $50 per ton (giving $3,200,) and for the outfit of the Archer at the rate of $20 per ton (giving $1,240,) and for the *catchings* of the Ripple, and the *detention* of the Archer, we propose to allow the sum of $900 each.

We thus find that the total amount to be allowed for the Ripple and the Archer will be $6,240.

The result, therefore, is that for the *New Claims*, amounting to $30,205, we propose to allow $14,490.

Adding to that amount the sum of $3,609, the above-mentioned allowance for the *Further Claims*, we find that our allowance for all the additional claims in Class A, comprised in the "Revised Statement," is $18,099.

The above results may be exhibited in the following form:

	Claims.		Propo'd Allow's.
New Claims	.....	$30,205	$14,490
Further Claims—			
(*a*) Vessels and outfits	$8,263		.....
(*b*) Secured earnings	30,789		.....
(*c*) Prospective earnings	150,314		.....
(*d*) Damages	55,200		.....
(*e*) Personal effects	32,228		3,609
		267,794	.....
		297,999	18,099

CLASS B.

We will now proceed to report on such claims comprised in the "Revised Statement" as are to be referred to Class B, that is to say, the class of vessels *loaded with given specific cargoes;* and we begin by noticing an exceptional case in which a somewhat important reduction is made in the claim. It will be found at page 22 of our First Report that we selected the Avon as a case illustrating the extravagant nature of some of the demands under this Class B. She was a vessel of 900 tons, and the total claim in respect of *ship and freight* in the "Former Statement" amounted to $130,000. We allowed for the *vessel* $36,000, and for the *freight* $25,000; so that the total allowance was $61,000. In the "Revised Statement," the claim has been reduced from the aforementioned sum of $130,000 to $63,000, being only $2,000 more than our allowance.

In the "Former Statement" the claims in this class amounted to	$2,867,619	
But the claim in respect of the Avon has been reduced by	67,000	
Leaving, therefore, the amount of	.....	$2,800,619
to be compared with the corrected amount of claims in Class B, contained in the Revised Statement, amounting to	.....	3,107,141
Therefore, the total amount of the additional claims in the Revised Statement is	.....	306,522

And it consists of:

(*a*) Additional claims for value of vessels, (including insurances) ..	$161,642	
(*b*) Additional claims for value of freights, (including insurances) ..	39,233	
(*c*) Additional claims for value of cargoes, (including insurances) ..	87,706	$306,522
(*d*) Additional claims for damages	7,183	
(*e*) Additional claims for personal effects	10,758	

As regards the item (*a*,) the additional claims *for the vessels*, it consists of $40,000 claimed by owners or insurance companies over and above their claims in the "Former Statement;" of $17,442 for vessels not mentioned in the "Former Statement;" of $104,200 for *vessels* the value of which was not claimed for in the "Former Statement," although claims in respect of their *cargoes*, or other matters connected with them, were advanced.

The first-mentioned part of the claim, amounting to $40,000, must, of course, be rejected, as the estimate of $40 per ton which we made in our First Report will, in our opinion, afford an adequate allowance for the value of the vessels.

The second-mentioned part of the claim, amounting to $17,442, is for the Otter Rock, (page 123,) the Arcade, (page 266,) and the E. F. Lewis, (page 279.) Although in none of these cases any tonnage is given or other means afforded to arrive at a judgment of the values, nevertheless, inasmuch as it would not be prudent or proper, for the purposes of our Present Report, to reject these claims altogether, we have estimated the value of the vessels by making a deduction proportionate to what we found in our First Report on Class B, to represent the overvaluation of all the vessels. The deduction so arrived at amounts to $6,842, leaving as the allowance to be made, $10,800.

As regards the last-mentioned portion of the claim for $104,200, it will be found, in the note at page 20 of our First Report, that in Class B there were five vessels the values of which were not claimed. In the "Revised Statement," claims are now advanced for three of these vessels, viz, the M. L. Potter, of 400 tons, (page 122,) the Windward, of 160 tons, (page 204,) and the Lamont Dupont, of 195 tons, (page 285.) Accordingly, for the *values of these vessels* of an aggregate tonnage of 755 tons, we now make an allowance at our ordinary rate of $40 per ton, amounting to $30,200, and, adding this to the afore-mentioned sum of $10,800, we find that there should be allowed, in respect of the claim of $161,642 for the *value of the vessels*, (*a*,) the sum of $41,000.

As regards the item (*b*,) viz: the additional claim of $39,233 for *freights* and *insurances* thereon, it is divisible into $8,477 claimed by owners or insurance companies for freights over and above their claims in the "Former Statement;" of $1,256 for freights in respect of vessels, not comprised in the "Former Statement;" of $29,500 claimed for freights of vessels (for the first time) in the "Revised Statement," although *other claims* connected with those ships were advanced in the Former Statement.

The first-mentioned part of this claim, $8,477, must be rejected, since we have already made allowance in our former report for losses in respect of freight.

The secondly-mentioned part of the claim, $1,256, we propose to pass, as it does not appear to us to be very excessive.

The last-mentioned part of the claim, $29,500, is made up of $6,000 in respect of the M. L. Potter, $5,000 in respect of the I. Littlefield, and $18,500 in respect of the Gildersleeve, for which, in the Former Statement, no claims were advanced; and, consequently, no allowance has yet been made. We have shown in our First Report that the claims for *gross* freight cannot be admitted, and we propose, instead thereof, to make, in accordance with the principles stated in our First Report, the ample allowance of $6,000.

As regards item (*c*,) viz: the additional claim of $87,706 for *cargo and insurances* thereon, the amount of the insurances being $72,197. The same difficulties which we explained in our First Report of course present

themselves here also in respect of the cargoes; and, although (as we shall show when discussing the additional claims under Class C) there are many reasons for inferring from the additional claims made in the Revised Statement that our deduction of 12 per cent. will probably prove to be very inadequate, we think it better for the purpose of this provisional estimate to abide by the rule we have hitherto adopted.

As regards item (*d*,) viz: the claim of $7,183 for *damages*, it is presented in respect of one ship, (the Emily Fisher, page 222,) the tonnage of which is not given, and it is described as *a claim for partial destruction of the vessel, for loss of freight, for loss paid owners of cargo, and for loss (paid expenses, &c.) on vessel.* The ship is described in the "Revised Statement" as having been captured by the "Retribution," and run ashore on the Acklin Islands, where she was partially destroyed; whereas in the "Former Statement" no mention whatever was made of her having been run ashore, nor was any reference made to any claim advanced for *damage to the ship*, although a particular description was given of the *injury sustained by the cargo.* Considering the peculiar form in which the claim is presented, and that if the ship had in fact sustained injury for which the owners had not already received compensation, those owners, who are stated to reside in New York, would in all probability have advanced claims at an earlier moment than the 15th April last, we are of opinion that this claim should be entirely rejected; and it appears to us that the propriety of this view is much confirmed by the fact that a considerable portion of *the additional* claim is alleged to be for loss paid to owners of cargo, and that the latter claim for loss of cargo $9,352.26, while the insurers on cargo claim *exactly* the same amount.

Finally, as regards item (*e*,) viz: the claim of $10,758 for *personal effects*, we propose, as in our First Report, to go through the different cases, and to state when we think that any deduction should be made; merely premising that, in estimating the deduction, we have taken into account the tonnage and character of the vessel, the form in which each claim is presented, as well as other circumstances which, in certain cases, appear to us material, but which it is not necessary to point out specifically.

Lafayette.—Here the claim by the mate for $766, which is more than that advanced by the Captain, appears to us excessive. We propose that it should be reduced by $366

M. L. Potter.—We propose no reduction.

Aron.—In this case the Master, in addition to his former claim, which (as will be seen on reference to our First Report, page 24) appeared to us exorbitant, has advanced a claim of $200. We propose that this should be rejected. This will require a deduction of 200

Southern Cross.—We propose no deduction.

Susan.—Here the Mate claims for *loss of personal effects and wages*, $452. For reasons fully stated in our First Report the claim for wages must be disallowed, and we purpose to allow in respect of *the loss of effects*, $200, making a deduction of 225

Atlantic.—In this case the Master claims for loss of *freight, stores, personal effects*, $795; the Mate claims $165; and three seamen claim, respectively, $145, *for loss of personal effects.* We propose to allow in respect of the Master's claim, $300. We propose no deduction in the case of the claim made by the Mate. The claims by the seamen appear to us to require a deduction of $225. The effect of making these several allowances will be to allow in all, $675, and to make a deduction altogether of 720

Spokane.—We do not propose that any deduction should be made.

Oneida.—Here we find a claim of $4,941 for loss of *personal effects* by Henry W. Johnson, who is merely described as of Stamford, Connecticut. We think that so vague and large a claim for *personal effects* put forward at the last moment is not likely to be a *bona-fide* claim, and that it should therefore be disallowed, making a deduction of 4,941

Windward.—In this case the Master claims for *loss of personal effects*, $500. This appears to us extravagant, and we propose that a deduction should be made of $150

These deductions will be found to reduce the claim of $10,758, for *personal effects*, to $3,432.

The result, therefore, at which we have arrived in respect of the claims comprised in Class B may be exhibited in the following form:

	Claims.	Proposed allowances.
(*a*) For vessels	$16,642	$41,000
(*b*) For freights	39,233	7,256
(*c*) For cargoes	87,706	76,182
(*d*) For damages	7,183	.....
(*e*) For personal effects	10,758	3,432
	306,522	127,870

CLASS C.

In the "Former Statement" the claims comprised in this class amount to		£5,794,687
In the "Revised Statement" the claims comprised in this class amount to	$6,443,370	
But the errors pointed out at page 318 of this Report in respect of the Commonwealth, Sea Lark, Union Jack, Crown Point, and Colcord, vessels belonging to this class, require altogether a deduction of	6,448	
So that the corrected amount of claim in the "Revised Statement" is		6,436,922
Therefore the total amount of the additional claims in the "Revised Statement" is		642,235

And it consists of:

a.	Additional claims for vessels, amounting to	$104,651	$172,652
	Additional claims for insurances on vessels, amounting to	68,001	
b.	Additional claims for freights, amounting to	14,493	79,693
	Additional claims for insurances on freights, amounting to	65,200	
c.	Additional claims for cargoes, amounting to	226,478	336,699
	Additional claims for insurances on cargoes, amounting to	110,221	
d.	Additional claims for damages, amounting to		22,000
e.	Additional claims for personal effects, amounting to		31,191
			642,235

As regards item (*a*,) for *vessels and insurances on vessels*, it consists, with the exception of $21,800, of *Further Claims* for vessels already claimed for in the "Former Statement," and may be almost entirely traced to owners advancing claims simultaneously with insurance companies. An adequate allowance for the value of these vessels has, in our opinion, been made in our First Report, and we therefore cannot propose any further allowance in respect of the additional claim, ($72,652,) except as regards the sum of $21,800 just referred to, which represents a claim for the Robert Gilfillan, of 240 tons, (p. 221,) a vessel not comprised in the "Former Statement;" estimating her value at our rate of $40 per ton, we allow for her, $9,600.

It follows, therefore, that for the claim (*a*) of $172,652 for *the vessels* we propose an allowance of $9,600.

As regards item (*b*,) for *freights and insurances on freights*, it consists, with the exception of an amount of $61,500, entirely of *Further Claims* for freights already claimed for in the "Former Statement," and it must,

for the same reason for which we have just disallowed similar claims in respect of the vessels, be rejected.

As to the amount of $61,500, the residue of this item, it is claimed by the Atlantic Insurance Company in respect of the Contest, (page 30.) It is to be observed that in the Revised Statement the ship-owners repeat the admission made in the "Former Statement," that they have received $38,500 for insurances on ship and cargo, and for this amount the insurance company might be expected to claim; but in addition, they, for the first time, advance a claim in the "Revised Statement" for $61,500 in respect of *freight* by claiming for *insurance on ship, cargo, and freight in the lump*, a round sum of $100,000. The ship was bound on a voyage from Japan to New York, and was 1,109 tons register, so that the claim for *freight* is at the rate of $56 per ton; but it must be rejected, because it is an unjustifiable claim for *gross* freight; and according to the principles fully stated in our First Report, we substitute, in proportion to the tonnage of the vessel, an allowance which we have estimated at $4,000.

It follows, therefore, that for the claim (*b*) of $79,093 for *freight*, we propose an allowance of $4,000.

We now pass to item (*c*,) for *cargoes and insurance on cargoes;* but before analyzing this large additional claim, it appears to us important to premise the following general observations.

As regards the form in which these additional claims are presented, there are two facts disclosed in the list of documents appended to the statements of the claims which distinguish, in a very notable manner, these *additional* claims from those comprised in the "Former Statement." The one is, that the majority of the new claims are presented, not by the claimants themselves, but by one or two firms who seem to have made it their business to collect claims. The other is, that in a very great number, and, we believe, in the majority of cases, there are no bills of lading filed at Washington which would evidence the shipment of the goods or the property in them.

From the volume already referred to in this Report, containing "The correspondence relating to claims against Great Britain," it appears that a list of claims was prepared as early as the year 1866, and that in 1869 there was presented to the Congress of the United States a new list, which, according to the statement of Mr. Hamilton Fish, (to be found at page 444 of the same volume,) the Government of the United States "used every effort to make as complete as possible." Under these circumstances, and also when we find again a third list of claims presented to the Tribunal at Geneva, it seems scarcely credible that persons having sustained *bona fide* losses, unless they had already received compensation, would have omitted to present them in any of the three lists, and would have deferred doing so until the 15th of April last. We therefore expect that, if ever these *additional* claims come to be separately investigated and properly sifted, it will be found that many of them are fictitious; that in numerous cases, and especially in those of goods consigned to or from British ports, the owners were insured in England, and have received compensation from British underwriters; and that in other cases, particularly in those where no bills of lading have been filed, consignors are now claiming for goods, the property in which has passed to consignees, who either are claiming at the same time, or have been paid by English underwriters.

We have not, however, felt ourselves justified in acting upon this expectation, but have, with the exception of a few cases which we shall particularly notice, adopted the course pointed out on page 7 of our First Report. We accordingly propose to deduct, as before, 12 per cent. from

the gross amount of the additional claims for goods, profits, commissions, and insurances, and to regard, for the purpose of the present estimate, the balance as representing the value of the goods, free on board, together with ordinary interest from the time of shipment until capture. This deduction of 12 per cent. is justified by the reasons fully stated in the introductory part of our FirstReport, especially as the additional claims for cargo here also include sometimes claims for profits at the rate of 50 and even 100 per cent., as well as claims for commissions, and damages for non-arrival of goods, and moreover appear to involve "double claims for single losses" to a considerable amount.

Having made these preliminary observations we proceed to consider this item (*c*) of $336,699, which comprises claims for *cargoes, profits, commissions, and insurances* thereon; and we will begin by specifying those particular claims which we think ought to be rejected.

1. *W. McGilvery*, page 219.—This is a vessel not claimed for in the "Former Statement," and for her cargo a claim is made of $4,752; but as the Jeff Davis is not one of the cruisers mentioned in the United States Case, this claim must, for the reasons stated at page 2 of the British Counter Case, in reference to the Boston and the Sallie, be certainly rejected.

2. *Anna F. Schmidt*, page 16.—Baker and Hamilton, of Sacramento, California, claimed in the "Former Statement" $6,474 partly directly, and partly through insurance companies. In the "Revised Statement" they advance a claim of $13,078, which is all but double the former amount. We consider this to constitute in all probability a *double claim for a single loss*, and propose therefore to reject this additional claim of $6,604.

3. *Sea Lark*, pages 78–82.—Here Osgood and Stetson admit having received from the Merchants' Mutual Marine Insurance Company $1,000, but do not give credit for this sum, although it is also at the same time claimed by the insurance company. This therefore constitutes a *double claim for a single loss*, and gives rise to the deduction of $1,000.

4. *Sea Lark.*—F. M. and Mary Rollins claim $10,000, but admit having received from insurance companies $1,565 in *gold*, which, according to the rate of exchange inferred from the case of the Morning Star, as stated in page 319 of this Report, would amount to $2,150 *currency*. There must therefore be a deduction of $2,150.

5. *T. B. Wales*, page 96.—There are here two additional claims, viz, a claim by Young and Emmons of $3,588 for *loss on cargo above insurance*, and a claim by Samuel Stevens of $3,500 for *loss on cargo and profits above insurance.* On comparing the claims made by these persons and by the companies with whom they had effected insurances in the "Revised Statement" and in the "Former Statement," we have scarcely any doubt that these claims have been already discharged by the insurance companies who are claiming at the same time, and we therefore reject these two claims, which together amount to $7,088.

6. *Good Hope*, page 218.—Here the Equitable Safety Insurance Company have advanced two additional claims, one of $10,000 as *insurers on cargo*, and another of $10,000 as *insurers on ship for Jasigi, Goddard & Co.* On comparing the claims made by this firm, and by companies as insurers for them in the "Original List" of 1866, with those in the "List presented to Congress in 1869," as well as with those in the "Former" and in the "Revised Statements," we think it can be proved, almost beyond a doubt, that the additional claim by the insurance company of $10,000 in respect of the cargo must be rejected as *a double claim for a single loss.*

7. *Crown Point.*—It appears from the "Original List" that M. Heller & Brother, of San Francisco, and J. Heller & Brother, of New York, are the same firm; and from this fact it can be inferred, with scarcely any doubt, from the claims which M. Heller and J. Heller advance for loss on cargo, (at pp. 125, 126 of the former, and pp. 152–154 of the Revised Statement,) that they are making *double claims for single losses, at least* to the extent of $9,044; we say *at least*, because we cannot help viewing with considerable suspicion a claim made at the same time by a firm of William Heller & Co., of New York and San Francisco, (page 125 of the "Former," and page 151 of the "Revised Statement,") for very nearly the same amount as that claimed by John Heller. We therefore deduct the sum of $9,044.

Adding then together the seven amounts of $4,752, $6,604, $1,000, $2,150, $7,088, $10,000, and $9,044, which we reject for the reasons just stated, and subtracting their total amount of $40,638 from the amount claimed for cargoes, namely, $336,699, we obtain a balance of $296,061. For reasons already stated, we deduct from this balance 12 per cent., and thus obtain the sum of $260,534, which, for the purpose of the present estimate, we propose to allow, instead of the claim of $336,699.

As regards item (*d*,) of $22,000 for *damages*, there are two claims, each of $10,000—one by the widow of the First mate, and the other by the Second mate of the Crown Point—for *damages, loss of wages, and personal effects.* We have assumed that of this sum $1,000 is claimed for *personal effects*, and have therefore excluded it from this item; and the remaining $19,000 we put down as a claim for *damages and loss of wages, time, &c.*, which, for reasons fully stated in our First Report, must be rejected. The residue of this item, viz, $3,000, represents a claim for *damages* occasioned by the Jeff Davis, (see page 219,) with which, for the reason already stated, we have nothing to do. It follows, therefore, that we propose to reject entirely the claim (*d*) of $22,000 for *damages.*

As regards item (*e*,) of $31,191 for *personal effects*, it will be found, on referring to our former Report on Class C, (page 26,) that the claims for *loss of personal effects* on board the vessels comprised in that class are especially extravagant, and that we consequently made a general allowance for these claims, at the rate of $3 per ton. This allowance appeared and still appears to us to be, on the whole, sufficient to cover any loss probably sustained in respect of *personal effects;* and as the "Revised Statement" does not comprise any new vessels belonging to this class except the Robert Gilfillan, (which, as already stated, we put on one side,) we do not think that the additional claim (*e*) for *personal effects calls* for any additional allowance.

The result, therefore, at which we have arrived as to the additional claims under Class C may be exhibited in the following form:

	Claim.	Disallowed.	Allowed.
a. Vessels	$172,652	$163,052	$9,600
b. Freights	79,693	75,693	4,000
c. Cargoes	336,699	76,165	260,534
d. Damages	22,000	22,000	.....
e. Personal effects	31,191	31,191	.....
	642,235	368,101	274,134

CLASS D.

In the "Former Statement" the claims comprised in this class amount to ...	$730,959
But of this amount there has been withdrawn, in the case of the Emma Jane, (page 37,) the sum of	9,000
Leaving a sum of	721,959
To be compared with the sum claimed in the "Revised Statement"	887,831
So that the total amount of the *additional* claims in the "Revised Statement" is	165,872

And it consists of claims for—			
(*a.*) For vessels	$111,959	} $116,959	
For insurances on ditto	5,000	}	
(*b.*) For freights	.....	.....	
For insurances on ditto	.....	.....	
(*c.*) For cargoes	5,000	} 26,155	
For insurances on ditto	21,115	}	
(*d.*) For damages		13,500	
(*e.*) For personal effects		9,258	
		165,872	

As regards item (*a*) for *vessels and insurances*, it consists of—

New Claims, (*i. e.*, claims for vessels not comprised in "Former Statement,") $102,459.

Further Claims, (*i. e.*, fresh claims for vessels comprised in "Former Statement,") $14,500.

The *New Claims*, amounting to $102,459, are—for the Taeony, 295 tons, (page 206;) the Golden Rocket, 610 tons, (page 269;) and the Vigilant, 650 tons, (page 271.)

In the absence of all information as to the class or condition of these vessels, we value them at our average rate of $40 per ton, which gives an allowance of $62,200.

The *Further Claims*, amounting to $14,500, consist of a claim of $500 for the Josiah Achom, and $14,000 for the Estelle.

As to the Josiah Achom it will be found that at page 28 of our First Report there was a claim of $7,500 for *the vessel and her outfit*, which we felt ourselves compelled to allow, because there was no information given as to her tonnage, destination, or employment. The "Revised Statement" supplies the required information, and as our valuation of this vessel of 125 tons would be considerably less than the amount of $7,500 already allowed, we think the additional claim must certainly be rejected.

As to the Estelle, on referring to page 26 of our First Report it will be seen that we there rejected the claim of $4,000 which was made by an insurance company, because it did not seem in any way to represent the value of the vessel, for which no claim was advanced in the "Former Statement." In the "Revised Statement" a claim is made of $14,000 for the *value of this vessel*, (300 tons,) and although it is somewhat in excess of our average valuation, still, judging from the trade in which she was engaged, we assume that she must have been a vessel of a good class, and we propose, therefore, that the claim of $14,000 should be allowed.

We have thus estimated the *New* claims at $62,200, and the *Further* claims at $14,000, and therefore propose an allowance of $76,200 for the claim (*a*) of $116,959 in respect of *the vessels*.

As regards item (*c*,) for *cargoes and insurances* thereon, it consists of a claim of $21,155 by the Atlantic Mutual Insurance Company, for in-

surance on cargo per the Umpire, and a claim of $5,000 by Messrs. Lawson and Walker on account of Collins for cargo per the Mondamin.

As to the claim by the Atlantic Mutual Insurance Company, although it seems almost inexplicable that it should have been presented only at the last moment, we propose to allow it, subject, however, to those remarks which we made at page 14 of this Report as to all the *additional* claims for cargoes. As to the claim for goods per the Mondamin, it is for *cargo* on board a vessel, described at page 159 of the "Revised Statement" as being in ballast, and for this reason cannot be regarded without suspicion; moreover, it is put forward at the last moment without any particulars or information to support it, and is merely presented in a letter from Messrs. Lawson and Walker, one of the two or three firms who seem to have made it their business to collect additional claims. For all these reasons the claim is one which in our opinion should be rejected.

Deducting, then, 12 per cent. from the claim by the Atlantic Mutual Insurance Company of $21,155, we obtain the sum of $18,623, which, for reasons stated in our First Report, we assume to represent the value of the cargo free on board, and we therefore propose that this sum of $18,623 be allowed for the claim (*c*) of $26,155 in respect of *the cargoes*.

As regards the item (*d*) for *damages*, it consists of only one claim of $13,500 by the owners of the Tacony for "loss by interruption of business," a claim which must be rejected for reasons so often stated in our First Report.

As regards the item (*e*,) for *personal effects*, the claims are as follows:

The Sonora, p. 90.—Here are claims amounting to $5,471 by the Master and Mate for *loss of effects, time, passage, and expenses*, no such claim having been made in the "Former Statement." For reasons stated in our First Report the only claim which can be taken into account is that for *loss of personal effects*, and we consider that for this loss a sum of $1,000, viz, $700 for the Master and $300 for the Mate, will give adequate compensation.

The Mondamin, p. 188.—Here a new claim is advanced by Dillingham for $1,143 for *loss of personal effects*, &c., but as the vessel was in ballast, and the Master and Mate make no claim for *personal effects*, and there is no description given of the claimant, and no information as to whether he was a passenger or a seaman, we think this claim ought not to be allowed.

The Harvey Birch, p. 220.—Here there is an additional claim by the Captain of $1,047. In our First Report (p. 28) we allowed the sum of $3,500 for *loss of personal effects* on board this vessel, and as we consider this allowance amply sufficient to cover all such losses, we think this claim should be rejected.

The Delphine, p. 234.—Here the Mate claims $825, but as in our First Report (p. 28) we allowed the liberal sum of $3,090 for loss of *personal effects* in respect of this vessel of 705 tons, we think this further claim should be disallowed.

The Tacony, p. 206.—Here Doherty at the last moment makes a new claim of $772 for *loss of personal effects*. Here again, as no description is given of the claimant, and as it is not known whether he was a passenger, common seaman, or officer, we think that a claim of this vague kind, presented only at the last moment, ought not to be assumed to be a claim other than by a seaman, and we allow $80.

We therefore propose that for the claim (*e*) of $9,258 for *personal effects* there should be allowed $1,080.

The result at which we have arrived with reference to the claims in Class D may be exhibited in the following form:

	Amount claimed.	Disallowed.	Allowed.
(*a.*) Vessels	$116,959	$40,759	$76,200
(*b.*) Cargoes	26,155	7,532	18,623
(*c.*) Damages	13,500	13,500	.....
(*d.*) Personal effects	9,258	8,178	1,080
	165,872	69,969	95,903

CLASS E, F.

In the "Former Statement" the claims comprised in this class are		$296,835
In the "Revised Statement" the claims in this class amount to	$501,951	
But on account of the errors of $2,130 and of $400, pointed out at page 4 of this Report, in reference to the Corriss Ann and Morning Star, (two vessels belonging to this class,) there must be added the sum of	2,530	
		504,481
So that the total amount of the *additional* claims in the "Revised Statement" is		207,646

This consists of claims—

(*a.*) For vessels	$150,189	$159,177
For insurances on vessels	8,988	
(*b.*) For freights	21,156	21,156
For insurances on freights	.....	
(*c.*) For cargoes	5,000	23,270
For insurances on cargoes	18,270	
(*d.*) For damages	.....	.....
(*e.*) For personal effects	4,043	4,043
		207,646

As regards item (*a*,) for vessels and insurances, it consists of:

New Claims, i. e., claims for vessels not comprised in "Former Statement"	$21,088
Further Claims, i. e., fresh claims for vessels comprised in "Former Statement"	138,089

The *New Claims* for vessels are as follows:

1. *The M. Y. Davis*, p. 185.—The claim for vessel is $16,100. Her tonnage and class are not given, nor is it stated where or when she was captured, or on what voyage she was bound, and as this claim was not presented until the 15th March last, and was then presented by Messrs. Lawson & Walker, (the firm already referred to,) without any material information or particulars being given, and apparently without being supported by any affidavit of the owner, or other proper evidentiary document, we think it should be rejected.

2. *The Joseph Maxwell*, p. 269.—This ship, the tonnage of which is not given, is represented to have been captured by the Sumter and run ashore, to have been afterwards got off and taken into the port of Cienfuegos, and to have been there sold with her cargo by order of the Court of Admiralty. The claim for the vessel is $4,988, advanced by an insurance company, for insurances on her. It may well be that the events above described constituted a constructive total loss, and obliged the insurance company to pay the amount insured, but in such case the

property would, by abandonment, pass to them, and as they have not given credit for its proceeds, nor supplied any particulars to show that it was substantially depreciated by any injury directly sustained by reason of the capture, we are of opinion that this claim ought not to be allowed.

The *Further Claims* for vessels are as follows:

1. *The Corriss Ann*, (p. 147,) *of* 568 *tons*.—On referring to our First Report (p. 30) it will be found that there was only a claim of $1,000 for freight and no claim for the vessel. In the "Revised Statement" there is a claim of $20,000 for *the vessel*, and as we do not consider it excessive, considering her tonnage, we propose to allow it.

The General Berry, p. 172.—This vessel, the tonnage of which is not given, is described as having been in the United States Service when destroyed. It appears from the synopsis of the list of papers appended to the Statement that a claim of $16,000 was presented to the United States Senate for the loss of this vessel. If this amount had been paid, the present claim is, in fact, one presented on behalf of the United States Government in respect of a vessel in its service; but, whether this be or be not so, it seems to us at any rate certain that under the circumstances more than $16,000 cannot be fairly demanded, and we, therefore, propose only to allow that sum.

3. *The George Latimer*, (p. 173,) *of* 200 *tons*.—Here there is a claim of $10,434. In the "Former Statement" there was a claim only of $1,600 for the vessel, which we allowed, as her tonnage was not given. (See page 30 of First Report.) Being now informed of her tonnage, and valuing her at our average rate, we think there should be an *additional* allowance of $7,000.

4. *The Byzantium*, (p. 208,) *of* 1,050 *tons*.—It will be found at page 30 of our First Report, that, as no claim was made for the value of the ship in the "Former Statement," we inferred that she had been probably insured and paid for by English underwriters, but as a claim is now advanced for ship and freight of $50,787, of which we ascribe $45,000 to ship and $5,787 to freight, we propose to allow for the vessel, at the rate of $40 per ton, (though with very considerable doubt,) the sum of $42,000.

5. *The Daniel Trowbridge*, (p. 267,) *of* 185 *tons*.—In the "Former Statement" there was no account given of her tonnage, nor of what had been done with her. In the "Revised Statement" she is said to have been destroyed on the 22d October, 1861, and there is a claim of $8,500 for *vessel*, and of $7,394 for *cargo and outfit*, of which latter sum we put $5,000 down to *cargo*, and $2,394 to *outfit*. As it seems almost inexplicable that a loss which occurred at so early a period should not have been claimed for until the 15th March last, unless the owners had received compensation, and as there is no claim by American insurance companies, it is only with very considerable hesitation that we propose to allow for the value of *ship and outfit*, in proportion to her tonnage, the sum of $7,500.

6. *The Eben Dodge*, p. 268.—In our First Report (p. 30) we allowed the only claim contained in the "Former Statement," viz, the sum of $2,250, which was claimed by an insurance company. In the "Revised Statement" there is now a very heavy claim for *vessel, outfit, and general earnings*, showing her to have been a whaler. It appears, from the account given of her by Captain Semmes, that she was probably a vessel of about 250 tons, and that, when she was captured, she was leaking badly, and had no cargo on board. As we have already allowed $2,500, we have no doubt that we shall be giving ample compensation by making an additional allowance of $20,000.

The result of this analysis is, that for the *additional* claim (*a*) of

$150,177 for *vessels and insurances thereon*, we propose that there should be made an allowance of $112,500.

As regards item (*b*) for *freights*, this consists of three claims:

1. *The Harriet Stevens*, p. 179.—It will be found, at page 30 of our First Report, that we have made an allowance *in lieu of freight*, and we do not think that the *additional* claim calls for any additional allowance.

2. *The Byzantium*, p. 208.—Here there is a claim for *ship and freight* of which, as already mentioned, we put down $5,787 *to freight*. Instead of this claim we propose to make, according to the principle stated in our First Report, an allowance of $4,000.

3. *The Eben Dodge*, p. 268.—Here there is a very large claim for *prospective earnings*. As she had only been twelve days on her voyage, we think that $1,000 will be an adequate allowance, in accordance with the principle stated in our First Report, which led us to reject the claims for *prospective earnings*.

We prefer, therefore, that for this claim (*b*) there be made an allowance of $5,000.

As regards item (*c*) for *cargoes*, this is made up of the following claims:

1. *The Ariel*, p. 23.—Here there is a claim of $78, which, though small, must, in our opinion, be rejected in accordance with the observations which we made at page 29 of our First Report.

2. *The Corriss Ann*, p. 157.—Here there is a claim of $4,400, which we propose to allow, because it is an insurance claim, although the fact of its being presented at so late a period makes it open to considerable suspicion.

3. *The Joseph Parks*, p. 269.—Here there is an insurance claim of $3,000, which we propose to allow for the same reason, but also with the same observation as before.

4. *The Neapolitan*, p. 270.—Here there is again an insurance claim for $8,986. This we also propose to allow.

5. *The Joseph Maxwell*, p. 269.—Here there is a claim of $2,006 for cargo, which, in our opinion, ought to be rejected for exactly the same reasons as have been already stated for the disallowance of the claim for the vessel.

6. *The Daniel Trowbridge*, p. 267.—We have already mentioned that we ascribe $5,000, part of the claim advanced in respect of this vessel, to cargo, and we propose to allow it, although not without much doubt, especially on account of there being a combined claim for cargo and outfit, of which it is impossible to know how much, if any, should be ascribed to cargo.

These allowances, in respect of the additional claims for cargo, amount to $21,186, and, deducting as usual 12 per cent., we propose that there should be made an allowance of $18,654 in respect of the item (*c*) of $23,270 for *cargo*.

As regards item (*e*) for *personal effects*, it consists of the following claims:

1. *The General Berry*, p. 172.—Here the Master and Chief officer claim $1,267 for *loss of personal effects*. We think that $700 will be adequate compensation, viz, $500 for the former and $200 for the latter.

2. *The Daniel Trowbridge*, p. 267.—Here the Master claims $1,572, although in the "Former Statement" he claimed the extravagant sum of $7,645. In our First Report (p. 30) we made him an allowance of $1,000, and see no reason to increase it.

3. *The A. G. Bird*, p. 275.—Here there is a claim of $300 by the officers, for *loss of personal effects*, which we propose to allow.

4. *The M. Y. Davis*, p. 185.—For the same reasons which led us to reject the new claim for this vessel, we propose that this claim, which is likewise presented by Messrs. Lawson and Walker, should be disallowed.

We therefore think that for the claim (*e*) of $4,043, for *loss of personal effects*, there should be allowed $1,000.

The result at which we have arrived, in reference to this class, may therefore be exhibited in the following form:

	Am't claimed.	Disallowed.	Allowed.
a. Vessels	$159,177	$46,677	$112,500
b. Freights	21,156	18,956	5,000
c. Cargoes	23,270	4,616	18,654
d. Damages	.....	.....	.....
e. Personal effects	4,043	3,043	1,000
	207,646	73,292	137,154

CORRECTION AND COMBINATION OF ALLOWANCES.

The following table exhibits the results we have arrived at as above mentioned in respect of the *Additional Claims*, contained in the Revised Statement arranged (X) according to Claims, (Y) according to Interests, (Z) according to the Cruisers.

(X) Classes.			(Y) Interests.			(Z) Cruisers.		
	Claims.	Allowances.		Claims.	Allowances.		Claims.	Allowances.
A	$297,999	$18,099	Vessels	$648,898	$234,755	Alabama	$440,989	$83,729
						Boston	.....	.....
						Chickamauga	87,416	46,146
B	306,522	126,800	Earnings	181,103	.....	Florida	455,811	263,627
						Clarence	39,622	11,880
C	642,235	274,134	Freights	140,062	30,404	Tacony	63,892	49,240
						Georgia	32,184	2,660
D	165,872	95,877	Cargoes	473,830	374,958	Jeff. Davis	7,752	.....
						Nashville	38,897	23,784
E, F	207,646	134,328	Damages	97,883	.....	Retribution	8,683	1,320
			Personal effects	78,478	9,121	Sallie	.....	.....
						Shenandoah	145,141	200
						Sumter	149,041	98,765
						Tallahassee	150,846	67,947
	1,620,274	649,238		1,620,274	649,238		1,620,274	649,238

Before proceeding to combine the foregoing allowances with those made in our First Report, so as to arrive at the allowance in respect of *all* the claims contained in the "Revised Statement," it will be necessary to draw attention to some alterations which should be made from the former *allowances;* partly on account of the withdrawal of some of the *claims* contained in the "Former Statement," and partly on account of some corrections the propriety of which further investigation has led us to make. It was stated, at p. 5 of the Present Report, that the *claims* in respect to four bonded whalers, amounting to $208,996, have now been withdrawn, and that three other *claims*, for vessels and freights, have been reduced by (altogether) the sum of $91,450. The last three reductions, it is to be observed, do not give rise to any diminution of our former *allowances*, because these were based on our average estimate of

the values of the ships, and not on the actual amounts contained in the statement; but, on the other hand, it is clear that the withdrawal of the *claims* for the four bonded whalers must cause a deduction of $36,000 from our allowance, this being the amount which we allowed in our First Report for those four vessels.

We will now point out the corrections which our First Report seems to us to require:[1]

In the first place, the claims made in respect of the Texana, captured by the Boston, and in respect of the Betsy Ames, captured by the Sallie, must undoubtedly be rejected, for the reasons stated at p. 2 of the British Counter Case. These were respectively $400 and $5,540. In our "First Report" we made no allowance in respect of the claim by the Texana, for other reasons therein named, but for the Betsy Ames we allowed the amount of claim less 12 per cent., or, in all, $4,875.

The allowance made in our First Report for the values of the vessels belonging to Class B requires an addition of $7,000. On referring namely to the foot-note at p. 20 of that Report, it will be found that we supposed there were *five* vessels mentioned but *not claimed* for in the Former Statement, whereas there were in fact only *four*, the vessel which we had erroneously included among the five being the Palmetto, of 175 tons. We have, therefore, to add an *allowance* for the value of this vessel at our average rate, amounting to $7,000.

In the second place, a closer examination of the claims made for cargo in the Former Statement when compared with those in the Original List and in the Revised Statement has enabled us to discover the following cases of *double claims for single losses*, in addition to those commented on at page 27 of our First Report:

1. The Union Jack—George A Potter (p. 95 of the Former, and p. 111 of the "Revised Statement," "Alabama," Class C) advances a claim in respect of cargo of $34,526, whilst, at the same time the Atlantic Mutual Insurance Company claim in respect of cargo $32,014, so that the latter sum must, of course, be deducted from the allowances we made in our first report.

2. The Charter Oak—(p. 182 of Former, and p. 231 of "Revised Statement," Shenandoah, Class C.)—Here the Manufacturers' Insurance Company claim $3,500 as insurers on cargo, and the Columbian Insurance Company likewise claim the same amount as re-insurers for the former company. This is, therefore, a double claim, and $3,500 must also be deducted from the allowances made on our First Report.

These deductions from allowances made under our First Report in respect of cargo make together $35,514, which amount, however, must be diminished by the 12 per cent. already taken off. We have therefore to deduct $31,253 in respect *of cargo*.

In the third place, we have, after considerable doubt, arrived at the conclusion, that it would perhaps be better to include in our "*allowances for freights*" some part of the expenditure which was taken into account in our *valuation of the vessels and their outfits*.

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[1] There are also the following *errata* in our First Report:
P. 24.—Fourth paragraph from bottom, for "cargo of grain" read "cargo of guano."
P. 24.—Third line from bottom, for "Mr. Rufus Green" read "C. R. Green."
P. 25.—Sixth line from bottom, for "Mr. Rufus Green" read "C. R. Green."
P. 27.—(Sea Bride,) for "R. Green and Co." read "Rufus Greene and Co."
P. 28.—Table showiug amount of claims, &c.:
Alabama, (amount claimed,) for "$6,537,711" read "$6,537,620."
Chickamauga, (amount allowed,) for "$80,108" read "$80,118."
Georgia, (amount allowed,) for "$257,031" read "$221,031."

It will be remembered, that in the introductory part of our First Report we fully explained that, in our opinion, the claim of *gross* freight could not be allowed, and that adequate compensation would be granted, in respect of the claims for the losses of the vessels, their outfits and freights, if to the original values of the vessels were added all the expenses incurred by the owners for the purpose of the voyages *up to the time of the capture*, together with interest. We had, therefore, to estimate *the values of the vessels and their outfits*, including the expenses incurred for *provisioning them and making them fit and able to leave port*, and to add thereto the expenses *incurred from the commencement of the voyages up to the time of capture, together with interest.*

It will be found, on reference to page 20 of our First Report, that we considered the price of $40 per ton to be a "liberal estimate of the average market price on which the value of vessels *at the commencement of their voyages* might be safely based," and we therefore took that price of $40 per ton as representing *the average value of ships and their outfits*, together with *the expenses necessary for rendering them fit and able to leave port.* These expenses we estimated on the average at $3 per ton, leaving for what may be called the "naked value" of the ship and her outfit a sum of $37 per ton; a sum which we considered, and still consider to be, on the average, amply sufficient. The expenses to which we have just referred would, no doubt, depend in each particular case to a considerable extent on the length of the voyage, the employment of the ship, on her carrying general cargoes, or carrying a given specific cargo, on her being loaded or being in ballast, and on other similar circumstances; but we were and still are of opinion that such expenditure will *on the whole* be fully covered by the average allowance of $3 per ton on all the vessels. It should, moreover, be observed that we have also left ourselves a considerable margin, inasmuch as we have made no exception in the cases of those vessels for which freight is not claimed (probably because it has been received from English underwriters) and which therefore clearly are not entitled to this allowance.

As the estimate of $40 per ton of the vessels includes the allowance of $3 per ton for the expenses of making them *fit and able to leave port*, it follows from the principle stated at the commencement of these observations, that we had only to add for the vessels claiming freight an allowance in respect of the expenditure incurred from the commencement of the voyage until the capture, together with interest, and it is this amount which we put down in our First Report as the "allowance for freight." Although this was for several reasons convenient, it has, no doubt, the effect of concealing the fact that the allowance *actually* made in respect of the claims for gross freight not only comprised the last-mentioned amount, but also the other allowance of $3 per ton, and we think that, as the form in which the claims are presented renders it almost necessary to award a separate allowance *in lieu of freight*, it may, on the whole, be better to make it include, not only what we termed in our First Report "the allowance for freight," but also the $3 per ton for the *expenses of making the vessels fit and able to leave port*, and therefore to deduct this latter amount from our estimate of *the values of the vessels*, which, as we have already said, included these expenses.[1]

This alteration is, however, a matter of comparatively small importance, since it of course only affects the *distribution* and not the *amount*

[1] Strictly speaking, the allowance *in lieu of freight* includes also an amount equivalent to the wear and tear of the vessel up to the time of capture, inasmuch as we have allowed the *original* value of the vessel at the commencement of the voyage.

of our former allowances, and is only made for the purpose of showing, somewhat more clearly, what we did *actually* allow in our First Report *in lieu of the claims for freight.*

We now proceed to combine the allowances in respect of the claims contained in the Former Statement with those in respect of the *additional* claims contained in the Revised Statement, in order to ascertain the compensation for *all the losses* mentioned in the latter Statement.

The allowances made in our First Report, as altered in amount and arrangement according to the foregoing considerations, are fully exhibited in Table No. 2, but are briefly summarized in the following form:

Allowance in respect of Classes.		In respect of Interests.		In respect of Cruisers.	
A	$1,745,421	Vessels and outfits	$3,237,930	Alabama	$3,267,678
				Boston	
B	1,628,294	Freights and earnings	812,032	Chickamauga	80,118
				Florida	2,635,568
C	4,128,854	Cargoes	3,709,520	Georgia	251,031
				Jeff. Davis	
				Nashville	62,900
D	339,551	Damages	68,446	Retribution	17,701
				Sallie	
E. F	132,437	Personal effects	146,629	Shenandoah	1,338,236
				Sumter	4,050
				Tallahassee	317,275
	7,974,557		7,974,557		7,974,557

To these allowances we have now to add the allowances we have ascertained in our Present Report for the *additional claims* contained in the Revised Statement; and the result, which is fully exhibited in Table No. 3, is briefly seen also from the following table, and gives the *total allowances we propose for all the claims contained in the Revised Statement.*

Total Allowances in reference to Classes.		In reference to Interests.		In reference to Cruisers.	
A	$1,763,520	Vessels and outfits	$3,472,685	Alabama	$3,351,407
				Boston	
				Chickamauga	126,264
B	1,755,094	Earnings and freights	842,436	Florida	2,960,315
				Clarence	
				Tacony	
C	4,402,988	Cargoes	4,084,478	Georgia	253,691
				Jeff. Davis	
D	435,428	Damages	68,446	Nashville	86,624
				Retribution	19,021
E. F	266,765	Personal effects	155,750	Sallie	
				Shenandoah	1,338,436
				Sumter	102,815
				Tallahassee	385,223
	8,623,795		8,623,795		8,623,795

SUMMARY.

We now proceed to give a summary of the results we have arrived at in respect of all the claims contained in the Revised Statement:

The aggregate amount claimed in that Statement is		$25,547,161
But this amount includes a claim for increased insurance premiums, amounting to	$5,808,066	
And also a claim styled "Miscellaneous," amounting to	479,033	
For reasons stated at page 1 of this Report these last two claims must be rejected, and there are certain errors in the figures pointed out at pages 4 and 5 of this Report, which on the whole necessitates a deduction of	176,324	
		6,463,423
Leaving as the amount of *claim* to which our allowances apply		19,083,738

The manner in which this amount is distributed over the various claims is exhibited in the following table:

In reference to Classes.		In reference to Interests.		In reference to Cruisers.	
A	$8,147,363	Vessels and outfits	$6,900,108	Alabama	$6,954,159
B	3,107,141	Earnings and freights	6,847,404	Boston	400
C	6,436,922	Cargoes	4,973,131	Chickamauga	183,071
D	887,831	Damages	604,347	Florida, Clarence, Tacony	4,185,627
E. F.	504,481	Personal effects	358,748	Georgia	416,160
				Jeff. Davis	7,752
				Nashville	108,434
				Retribution	29,018
				Sallie	5,540
				Shenandoah	6,303,039
				Sumter	159,736
				Tallahassee	730,802
	19,083,738		19,083,738		19,083,738

I.—As to the vessels and outfits.

For the reasons stated in our First Report we have, with scarcely any exception, valued the whalers at $100, the fishing-vessels at $50, and the other vessels at $40 per ton *at the commencement of their voyages*, including therefore the expenses necessary for making them ready for sea. We have also shown that in the cases of the whalers captured by the Shenandoah it is, with the exception of two or three cases, clear, from the very admissions of the owners, that they are advancing claims for the same losses simultaneously with the insurance companies, and that, in a great majority of the other cases, a similar course has, to a very great extent, been adopted. These considerations, together with the circumstance of the owners having considerably overvalued their property, will sufficiently account for the reduction in the *amount of our allowances* as contrasted with *the amount of the claims* for *vessels and outfits.*

II.—As to the freights and earnings.

It is easy to prove that the amounts at which they are stated are, beyond a doubt, most extravagant, and that they in many cases involve *double claims for single losses.* We have also explained at length, in the introductory part of our first report, the various grounds on which, independently of its exaggerated amount, this claim for *gross* freights and *gross* earnings is utterly incapable of being supported, and why it should in our opinion be rejected; and in lieu thereof, such an allowance be made as would, as far as is legitimate or possible, satisfy the principle of *restitutio in integrum*, by placing the claimants almost in the same position as if they had not embarked in the unsuccessful adventure; an allowance which is far more liberal than that which has been awarded by the courts of America in similar cases. This allowance we have estimated at $842,436, which, when added to our allowance for *vessels and outfits and expenses incurred in making the ships fit and able to leave port*, amounts to $4,315,121, and will in our opinion fairly cover all losses in respect of the *vessels, their outfits, earnings, and claims for freights.*

III.—As to the cargoes.

As regards the claims for "*cargoes*," it will be seen from the introductory part of our First Report that the form in which these claims are

presented has rendered it impossible to ascertain, except in comparatively few cases, to what extent they involve *double claims for single losses*, as well as profits and the freight payable at the port of discharge; and we there fully stated the reasons why we entertain no doubt that if, from the total amount claimed for cargoes, profits, commissions, and insurances thereon, 12 per cent. be deducted, the result so obtained will, in all probability, exceed the real value of the goods at the port of shipment, together with interest from the time of loading until capture. We also explained that, by awarding this compensation, and thereby placing the owners in the same position in which they would have been, if, instead of embarking their capital in the shipment of the goods, they had invested it at the ordinary rate of interest, we were adopting a mode of compensation, not only consistent with well-recognized principles of jurisprudence, but also more liberal than that which has ever been applied by the courts of the United States.

In some cases, distinctly specified in our Reports, we have been able to discover that the owners and the insurance companies are simultaneously advancing claims for the same losses. In these cases we have, of course, deducted one of such double claims, and these deductions, together with those in respect of one or two claims which we have specially noticed and given our reasons for rejecting, amounted to about $340,000. After taking off 12 per cent. from the residue of the total claim, we thus arrived at the sum of $4,084,478 as the allowance for the cargoes. But although we have provisionally estimated the loss at this amount, we think it right to repeat that in our opinion this estimate will be found to be excessive, not only for the reasons stated in our First Report, but also because the additional claim of $473,830, advanced for *cargo* in the "Revised Statement," is open to very considerable suspicion on account of the peculiar circumstances, fully stated at pages 11 and 12 of this Report.

IV.—As to claims for damages and personal effects.

As regards the claims for *damages*, we have in almost all cases rejected them, because they are in effect claims in respect of *indirect* losses, or for damages of too remote and contingent a character to entitle the claimants to compensation.

As regards the claims for *personal effects*, we have generally specified the cases in which we consider them excessive, and have come to the conclusion that the sum of $155,750 will cover any loss for personal effects which can be proved to have been sustained.

V.—Result.

The ultimate result at which we have arrived is the following:

The total amount of the claims we have been considering, that is, all the claims contained in the "Revised Statement," exclusive of those for increased war premiums and the claims styled "miscellaneous," (all of which are "indirect claims,") and after correcting certain errors of calculation, and withdrawing those for the Sallie and Boston, is $19,077,798. We are of opinion that the sum of $8,623,795 will be amply sufficient to meet all the losses embraced in these claims.

The following arrangement shows the amount of the claims connected with each cruiser, after adjusting the several corrections, on which we have reported; and also the corresponding estimates we have made as

fully adequate to meet all the losses actually sustained, which, however, are *subject to the reservations* mentioned in our First Report:

Claims on account of—	Amounts claimed.	Amounts allowed.
Alabama	$6,954,159	$3,351,407
Boston		
Chickamauga	183,071	126,264
Florida, Clarence, Tacony	4,185,627	2,960,315
Georgia	416,160	253,691
Jeff. Davis	7,752	
Nashville	108,434	86,624
Retribution	29,018	19,021
Sallie		
Shenandoah	6,303,039	1,338,436
Sumter	159,736	102,815
Tallahassee	730,802	385,222
	19,077,798	8,623,795

The reservations to which we have above referred are the following:

I.—The question whether Great Britain is liable for any of the losses which are the subject-matter of these claims, and, if for any, for which of them, is a question with which we have not been concerned; and, keeping clear of what was not within our province, we have studiously confined ourselves to the task of sifting and analyzing the claims, and of ascertaining what in our opinion ought, according to well-recognized principles of jurisprudence, to be considered adequate compensation for the losses occasioned by each of the Confederate cruisers.

II.—The data which the statement of claims applies are, in several material respects, so scanty and so imperfect that we do not pretend to have estimated the allowance for each particular claim with complete accuracy, but we believe we have shown that there are valid and strong grounds for concluding that, if ever these claims come to be thoroughly sifted and examined, our estimate will be found to be in all respects a very liberal estimate.

NOTES.

I. There is one consideration to which it may be proper for us to direct attention, viz, the value of the "currency" dollar as compared with that of the "gold" dollar. We have no doubt that the claims comprised in the statement are made in the "currency" dollar, and it appears from the claim in the case of the Morning Star (p. 48 of this Report) that the value of that dollar may be taken to bear to that of the gold dollar the ratio of 5,614 to 7,744. In reducing the total amount of our estimate of allowances into "gold" dollars it must be borne in mind that so far as it relates to the claims for ships, freights, and damages it has been made in "gold" dollars, and therefore that it is only necessary to reduce the estimate in respect of cargoes and personal effects into the same currency. The total amount of our estimate of all the losses alleged to have been sustained, when thus reduced into gold dollars, may be converted into pounds sterling according to the proper rate of exchange, (which in some instances to be found in the claims has

been assumed to be $4.84,) and it will be found in all probability to be considerably less than £1,600,000.

II. We have appended to this report Table IV, which shows the values put by Captain Semmes on the prizes he captured, and inasmuch as the captor generally considerably over-estimates the value of his prizes, we think that this table may throw some light which may prove useful on the nature and extent of the claims advanced for losses alleged to have been sustained by the Alabama captures.

ARTHUR COHEN.
SIDNEY YOUNG.

JUNE 8, 1872.

TABLE No. 1.—*Showing progressive increase in the amount of claims for losses incurred through the respective cruisers as stated at different periods.*—(*See report, pp.* 316–318.)

	Original List, 1866.		United States Amended List, 1869.		Former Statement November, 1871.		Revised Statement, March, 1872.	
	Alleged captures.	Alleged losses.	Alleged captures.	Alleged losses.	Alleged captures.	Alleged losses.	Alleged captures.	Alleged losses.
Alabama	51	$3, 708, 716	57	$5, 242, 962	58	$6, 547, 610	58	$7, 009, 121
Boston	.....	.....	1	400	1	400	1	400
Chickamauga	.....	.....	3	114, 147	3	95, 655	4	183, 071
Florida	13	1, 979, 288	23	3, 031, 849	38	3, 698, 609	30	3, 952, 359
Florida, Clarence	.....	.....	1	14, 520	.....	.....	2	54, 142
Florida, Tacony	.....	.....	1	8, 400	.....	.....	10	169, 199
Georgia	4	210, 295	5	326, 351	5	383, 976	5	416, 160
Jeff. Davis	.....	.....	.....	.....	.....	.....	2	7, 752
Nashville	.....	.....	1	70, 584	1	69, 537	2	108, 434
Retribution	.....	.....	2	20, 982	2	20, 334	2	29, 018
Sallie	.....	.....	1	5, 540	1	5, 540	1	5, 540
Shenandoah	26	3, 236, 805	29	4, 490, 100	40	6, 488, 320	36	6, 426, 383
Sumter	.....	.....	1	2, 250	3	10, 696	8	167, 673
Tallahassee	.....	.....	8	276, 545	} 17	579, 956	22	730, 802
Olustee	.....	.....	4	73, 875	}			
Increased war premiums	.....	.....	.....	.....	.....	1, 120, 795	.....	5, 808, 066
Miscellaneous	.....	.....	.....	.....	.....	.....	.....	479, 033
Total	94	9, 135, 104	138	13, 768, 506	169	19, 021, 428	183	25, 547, 161

TABLE No. 2.—*Showing the result of the corrections and re-appropriations of the claims and the corresponding allowances in summaries Nos. 1, 2, and 3 of "First Report," in accordance with our remarks, (Present Report, pp. 335–338.)*

SUMMARY (No. 1.)—Classes (corrected and re-arranged as per Report.)

	Claims.			Allowances. Value at (as per corrected Report)—		
CLASS A.						
V (*a*)	$1,721,417					
V. I.	791,163					
		$2,512,580			$1,029,200	
E. S.	616,560					
E P	4,085,501					
Irc	111,669					
		4,813,730			559,059	
P. E		93,943			56,144	
		7,420,253			1,644,403	
Eight whalers detained (*f*)	595,747					
Less 4 ditto (withdrawn)	208,996					
		386,751			*g*67,446	
Six fishing-vessels	33,638			$24,850		
E. S.	2,322					
E. P	5,800			8,122		
P. E	600			600		
		42,360			33,572	
			$7,849,364			$1,745,421
CLASS B.						
V (*m*)	1,072,682					
I. V (*b*)	382,809					
		1,455,491			*h*870,795	
F (*m*)	413,907					
I. F (*c*)	90,000					
		503,907			*h*95,593	
C	218,850					
I. C	570,369					
		789,219			645,167	
P. E., &c		52,002			16,739	
			2,800,619			1,628,294
CLASS C.						
V	981,084					
I. V	557,912					
		1,538,996			938,395	
F	266,806					
I. F	178,431					
		445,237			103,829	
C	1,352,736					
I. C (*h*)	2,285,940					
		3,638,676		(*g*) (*i*) (	3,028,385	
P. E., &c		166,238			58,245	
			5,789,147			4,128,854
CLASS D.						
V (*d*)	443,605					
I. V (*e*)	112,000					
		555,605			294,335	
F	132,283					
I. F	6,000					
		138,283			33,395	
C						
P. E., &c		28,071			11,821	
			721,959			339,551
CLASS E. F.						
V	151,050					
I. V	3,850					
		154,900			80,355	
F	14,940					
I. F	2,000					
		16,940			12,034	
C	18,660					
I. C (*k*)	46,806					
		65,466			35,968	
P. E		59,129			4,080	
			296,435			132,437
			17,457,524			7,974,557

TABLE No. 2.—*Showing the result of the corrections and re-appropriations, &c.*—Continued.

SUMMARY (No. 2.)—Interests (corrected and re-arranged as per Report.)

	Claims.			Allowances. Valued at—		
Vessels and outfits:	$1,755,055				$1,054,050	
Class A (a)	1,072,682				m870,795	
B	981,084				938,395	
C	443,605				294,335	
D (d)	151,050				80,355	
E. F		$4,403,376				
Insurance on ditto:						
Class A	791,163					
B (b)	382,809					
C	557,912					
D (c)	112,000					
E. F	3,850					
		1,847,734				
			$6,251,210			$3,237,930
Earnings:						
Class A	4,091,301					
	618,882					
		4,710,183				
Insurance		111,669				
			4,821,852			567,181
Freights:						
Class B	413,907				m95,593	
C	266,806				103,829	
D	132,283				33,395	
E. F	14,940				12,034	
		827,936				
Insurance ditto:						
Class B (c)	90,000					
C	178,431					
D	6,000					
E. F	2,000					
		276,431				
			1,104,367			244,851
Cargoes:						
Class B	218,850				645,167	
C	1,352,736			(i) (l)	3,028,385	
D						
E. F	18,660				35,968	
		1,590,246				
Insurance on ditto:						
Class B	570,369					
C (h)	2,285,940					
D						
E. F (i)	46,806					
		2,903,515				
			4,493,361			3,709,534
Sundries, (damages and personal effects:)						
Class A (f)	481,294			Damage	g68,446	
B	52,002			Per. effect.	146,629	
C	166,238					
D	28,071					
E. F	59,129					
			786,734			215,075
			17,457,524			7,974,557

TABLE No. 2.—*Showing the result of the corrections and re-appropriations, &c*—Continued.

SUMMARY (No. 3.)—Cruisers (corrected and re-arranged as per Report.)

	Claims.		Allowances. Allowed at—		
Alabama:					
Class A (*a*)	$1,864,171			$460,893	
B	1,306,610			*m*618,538	
C	2,847,337			2,004,376	
D (*d*) (*e*)	378,443			136,021	
E. F	116,609			47,850	
		$6,513,170			$3,267,678
Boston:					
Class E. F (*k*)					
Chickamauga:					
Class B	95,655	95,655		80,118	80,118
Florida, (including Clarence and Tacony:)					
Class A	184,648			108,564	
B (*b*) (*c*)	855,796			644,709	
C	2,435,723			1,776,375	
D	70,379			44,570	
E. F	79,756			61,350	
		3,626,302			2,635,568
Georgia:					
Class B	203,195			105,194	
C	150,781			145,837	
E. F	30,000				
		383,976			251,031
Nashville:					
Class D		69,537		62,900	62,900
Retribution:					
Class B	18,705			16,461	
C	1,630			1,240	
		20,335			17,701
Sallie:					
Class C (*h*)				(*i*)	(*g*)
Shenandoah:					
Class A (*f*)	5,795,045			*g*1,171,464	
B	101,318			29,630	
C	145,935			*l*99,582	
D	93,100			37,560	
E. F	22,500				
		6,157,898			1,338,236
Sumter:					
Class E. F		10,695		4,050	4,050
Tallahassee:					
Class A	5,500			4,500	
B	219,340			133,644	
C	207,741			101,444	
D	110,500			58,500	
E. F	36,875			19,187	
		579,956			317,275
		17,475,524			7,974,557

(*a*) This has been reduced by withdrawal from claim of the Altamaha of the sum of.	$15,450	
(*b*) This has been reduced by withdrawal from claim of the Avon of the sum of	42,000	
(*c*) This has been reduced by withdrawal from claim of the Avon of the sum of	25,000	
(*d*) This has been reduced by withdrawal from claim of the Emma Jane of the sum of.	4,000	
(*e*) This has been reduced by withdrawal from claim of the Emma Jane of the sum of.	5,000	
(*f*) This has been reduced by withdrawal from claim of four of the vessels detained by the Shenandoah	208,996	
(*g*) This has been reduced by withdrawal from allowance for the vessels detained by the Shenandoah		$36,000
(*h*) This has been reduced by withdrawal from claim Betsy Ames (see p. 336)	5,540	
(*i*) This has been reduced by withdrawal from allowance for Betsy Ames		4,875
(*k*) This has been reduced by withdrawal from claim of Texana (see p. 324)	400	
(*l*) This has been reduced by withdrawal from the several allowances as mentioned (at p. 335)		31,253
Showing in all deductions from—		
Claims	306,386	
Allowances		72,128
(*m*) This has, on the other hand, been increased by allowance for the Palmetto, (see p. 336)		7,000

TABLE No. 3.—*Showing, under respective Divisions of Classes, Interests, and Cruisers, the Claims advanced under the "Revised Statement," (after adjusting the several errors named at pp. 4 and 5 of this Report,) together with the Allowances which we deem adequate to meet them. The said Claims and Allowances being those collectively arranged under our First Report on the "Former Statement," as adjusted under the respective Summaries of Table II, and under this Report on the "Addition to the Claims" of the "Former Statement" as advanced in the "Revised Statement."* (*See Table 2, p. 343.*)

F. R. means "First Report," as amended under Table II. P. R. (Present Report) means the corrected amount of Claims, as per "Revised Statement," additional to those of the "Former Statement," (as per analysis of Classes, p. 338, P. R.)

Classes.						Interests.						Cruisers.					
	Claims.		Allowances.				Claims.		Allowances.				No. of Captures.	Claims.		Allowances.	
A...F. R	$7, 849, 364	.....	$1, 745, 421	.....		Vessels...F. R.	$6, 251, 210	.....	$3, 237, 930	.....		Alabama.....F. R.	58	$6, 513, 170	.....	$3, 267, 678	.....
P. R.	297, 999	.....	18, 099	.....		P. R.	648, 898	.....	234, 755	.....		P. R.	....	440, 989	.....	83, 729	.....
		$8, 147, 363		$1, 763, 520				$6, 900, 108		$3, 472, 685					$6, 954, 159		$3, 351, 407
B...F. R	2, 800, 619	.....	1, 628, 294	.....		Earnings.F. R.	4, 821, 852	.....	.....	.....		Boston.....F. R	1	.....	.....	.....	.....
P. R.	306, 522	.....	126, 800	.....		P. R.	181, 103	.....	.....	.....		P. R	3	.....	.....	.....	.....
		3, 107, 141		1, 755, 094				5, 002, 955		567, 181					.....		.....
C...F. R.	5, 789, 147	.....	4, 128, 854	.....		Freights..F. R.	1, 104, 367	.....	244, 851	.....		Chickamauga.F. R	3	95, 655	.....	80, 118	.....
P. R.	642, 235	.....	274, 134	.....		P. R.	140, 082	.....	30, 404	.....		P. R	1	87, 416	.....	46, 146	.....
		6, 431, 382		4, 402, 988				1, 244, 449		275, 255					183, 071		126, 264
D...F. R	721, 959	.....	339, 551	.....		Cargoes ..F. R	4, 493, 361	.....	3, 709, 520	.....		Florida.....F. R.	38	3, 626, 302	.....	2, 635, 568	.....
P. R.	165, 872	.....	95, 877	.....		P. R	473, 830	.....	374, 958	.....		P. R.	1				
		887, 831		435, 428				4, 967, 191		4, 084, 478		Clarence .F. R.	1	559, 325	.....	324, 747	.....
E. F. F. R	296, 435	.....	132, 437	.....		Damages .F. R.	506, 464	.....	68, 446	.....		P. R.	1				
P. R	207, 646	.....	134, 328	.....		P. R.	97, 883	.....	.....	.....		Tacony...F. R	..				
		504, 081		266, 765				604, 347		68, 446		P. R	2		4, 185, 627		2, 960 315
						Personal effects..F. R	280, 270	.....	146, 629	.....		Georgia.....F. R.	5	383, 976	.....	251, 031	.....
						P. R.	78, 478	.....	9, 121	.....		P. R.	....	32, 184	.....	2, 660	.....
								358, 748		155, 750					416, 160		253, 691
												Jeff. Davis...F. R.	....	.....	.....	.....	.....
												P. R.	2	7, 752	.....	.....	.....
															7, 752		.....
												Nashville....F. R	1	69, 537	.....	62, 900	.....
												P. R.	1	38, 897	.....	23, 724	.....
															108, 434		86, 624

										Retribution	F. R.	2	20, 335	....	17, 701	
											P. R.	....	8, 683	....	1, 320	
														29, 018		19, 021
										Sallie	F. R.	1	....	....	....	
											P. R.	....	....	....	....	
														....		....
										Shenandoah	F. R.	6	6, 157, 898	....	1, 338, 236	
											P. R.	....	145, 141	....	200	
														6, 303, 039		1, 338, 436
										Sumter	F. R.	3	10, 695	....	4, 050	
											P. R.	5	149, 041	....	98, 765	
														159, 736		102, 815
										Tallahassee	F. R.	12	579, 956	....	317, 275	
											P. R.	5	150, 846	....	67, 947	
														730, 802		385, 222
		19, 077, 798		8, 623, 795			19, 077, 798		8, 623, 795					19, 077, 798		8, 623, 795

TABLE IV.—*Showing the vessels captured by the Alabama, ranged under the respective Classes; the Valuation the Captors placed upon each Vessel: the Allowance we have found to be adequate to compensate the Sum of the Losses in each Class; and, further, the progressive Claims advanced for these Vessels by the United States Government, at the several Periods alluded to at p. 316 of this Report.*

	Vessels.	Captor's Valuations.		Allowances as per Reports.		Original List Claims, (1866.)		United States Senate, (1869.)		Former Statement, (1871.)		Revised Statement, (1872.)	
Class A	Alert	$20,000				$57,859		$57,859		$202,726		$202,726	
	Altamaha	3,000				15,450		31,940		48,001		32,756	
	Benjn. Tucker	18,000				124,000		172,000		179,345		179,835	
	Courser	7,000				12,462		12,462		12,462		33,308	
	Elisha Dunbar	25,000				149,670		21,375		150,895		150,895	
	Kate Cory	10,568				29,620		48,374		56,334		56,474	
	Kingfisher	2,400						48,252		31,952		31,952	
	Lafayette, (No. 2)	20,908				69,471		69,444		88,946		141,855	
	Levi Starbuck	25,000				23,350		229,313		236,673		269,523	
	Ocean Rover	70,000				104,000		136,940		168,946		193,666	
	Ocmulgee	50,000						254,072		419,350		419,985	
	Nye	31,127				2,350		23,350		104,936		106,959	
	Virginia	25,000				153,950		167,500		167,500		167,500	
	Weather-gauge	10,000				10,221		10,221		11,546		30,446	
			$318,003		$464,111		$752,403		$1,283,102		$1,879,612		$2,017,880
Class B	Brilliant	164,000				106,707		106,707		123,238		125,213	
	Chas. Hill	28,450				45,278		45,278		45,276		45,276	
	Conrad	100,936				87,957		70,573		94,241		94,241	
	Crenshaw	33,869				639		631		27,474		27,474	
	Express	121,320				12,000		69,114		76,109		82,109	
	Golden Eagle	61,000				63,500		114,687		113,522		114,687	
	Jabez Snow	72,781				6,600		140,008		140,008		146,208	
	Jno. A. Parkes	66,157				33,201		126,204		126,517		126,800	
	Lafayette	100,337				103,989		103,989		113,290		121,795	
	Lamplighter	117,600				73,540		70,385		27,500		27,950	
	Louisa Hatch	38,315				82,250		85,380		85,380		85,380	
	Palmetto	18,430				500		500		22,833		22,833	
	Rockingham	97,878				105,000		105,000		216,956		235,456	
	S. Gildersleeve	62,783				17,500		35,000		35,000		35,000	
	Wave Crest	44,000				1,095		59,067		59,264		59,264	
			1,127,856		628,588		739,756		1,131,523		1,306,608		1,349,686
Class C	Amanda	104,442				73,229		73,229		69,853		69,853	
	Amazonian	97,665				90,977		139,822		126,903		135,903	
	Anna F. Schmidt	350,000				101,116		214,850		271,891		294,654	
	Contest	122,815				141,841		132,872		42,865		142,866	
	Dorcas Prince	44,108				33,526		58,315		59,815		59,815	
	Dunkirk	25,000				2,122		30,322		39,889		51,985	
	Golden Rule	112,000				42,156		69,143		82,036		88,181	
	Lauretta	32,880				15,000		27,200		27,950		30,340	
	Manchester	164,000				24,147		64,146		143,306		161,156	
	Martaban	97,628						18,657		52,922		52,922	

	Olive Jane	43,208	.....	.....	.....	3,637	.....	12,530	.....	69,839	.....	70,598		
	Parker Cook	10,000	.....	.....	.....	26,064	.....	25,400	.....	26,064	.....	26,064		
	Sea Bride	16,940	.....	.....	.....	118,638	.....	90,338	.....	143,638	.....	146,338		
	Sea Lark	550,000	.....	.....	.....	182,650	.....	244,404	.....	342,918	.....	365,447		
	Talisman	139,195	.....	.....	.....	129,996	.....	169,211	.....	187,405	.....	233,355		
	T. B. Wales	245,625	.....	.....	.....	196,036	.....	202,841	.....	221,894	.....	228,992		
	Tycoon	390,000	.....	.....	.....	303,809	.....	383,033	.....	434,818	.....	447,399		
	Union Jack	77,000	.....	.....	.....	67,921	.....	112,548	.....	161,514	.....	172,234		
	Winged Racer	150,000	.....	.....	.....	386,642	.....	331,940	.....	341,824	.....	365,768		
Class D			2,772,506	.....	2,073,837	.....	1,939,707	.....	2,390,801	.....	2,847,337	.....		3,143,090
	Chastelaine	10,000	.....	.....	.....	.....	.....	11,671	.....	11,671	.....	11,671		
	Emma Jane	40,000	.....	.....	.....	25,000	.....	79,000	.....	95,557	.....	86,558		
	Highlander	75,965	.....	.....	.....	36,000	.....	146,402	.....	191,171	.....	191,171		
	Sonora	46,545	.....	.....	.....	119,045	.....	89,544	.....	89,044	.....	94,514		
			172,510	.....	137,021	.....	180,045	.....	326,617	.....	387,443	.....		383,914
	Ariel	261,000	.....	.....	.....	8,500	.....	10,000	.....	10,345	.....	10,425		
	Baron de Castine	5,000	.....	.....	.....	.....	.....	.....	.....	1,500	.....	1,500		
	Justina	7,000	.....	.....	.....	.....	.....	7,000	.....	7,000	.....	7,000		
Class E, F	Morning Star	61,750	.....	.....	.....	.....	.....	[1]5,614	.....	[1]7,744	.....	[1]5,614		
	Nora	76,636	.....	.....	.....	83,500	.....	83,500	.....	83,500	.....	83,500		
	Starlight	4,000	.....	.....	.....	4,805	.....	4,805	.....	6,320	.....	6,320		
			415,386	.....	47,850	.....	96,805	.....	110,919	.....	116,609	.....		114,559
		58 vessels.	4,806,261	.....	3,351,407	51 vessels.	3,708,716	57 vessels.	5,242,962	58 vessels.	6,537,609	58 vessels.		7,009,129

[1] This is the claim alluded to at p. 318 as being made in the former statement in currency and in the revised statement in gold. In the latter form it will be seen it was first presented to the United States Senate in 1869.

ANNEX D.—FURTHER NOTE ON THE CLAIMS PRESENTED BY THE GOVERNMENT OF THE UNITED STATES FOR EXPENDITURE ALLEGED TO HAVE BEEN INCURRED IN THE PURSUIT AND CAPTURE OF CONFEDERATE CRUISERS.

EFFORTS MADE TO CAPTURE CONFEDERATE CRUISERS.

ALABAMA.

The United States in their Counter Case, while denying the pertinence of the point to the questions at issue, reiterate the assertion that they "made great efforts and incurred great expense in their efforts to capture the Alabama."

It is not proposed in this paper to do more than make a passing reference to the cases which the British Government considers point to an opposite conclusion, and which have been fully discussed in its Case and Counter Case:

(*a.*) The Tuscarora's remissness in not following up the Alabama after getting away from Liverpool.

(*b.*) The escape of the Alabama from the San Jacinto at Martinique, on 16th November, 1862.

(*c.*) Commodore Bell's remissness in not capturing her after she sunk the Hatteras off Galveston.

(*d.*) Admiral Wilkes's interference with the Secretary of the Navy's orders to the Vanderbilt; the failure of the captain of that ship to carry out the orders implicitly when allowed to proceed in their execution, and his final abandonment of the pursuit at the Cape of Good Hope.

The question now to be considered is, did the United States Government, with the means at its disposal, use "due diligence" in its efforts to arrest the career of the Alabama?

Mr. Welles, the Secretary of the United States Navy, in his first Report to Congress after the commissioning of the Alabama, of 1st December, 1862, stated that his department had "dispatched vessels to effect the capture of the Alabama, and there is now quite a fleet on the ocean engaged in pursuing her." (Page 24.)

Now, on referring to the claims put forth against Great Britain, in Volume VII of the Appendices to the United States Case, and comparing the several dates, we find this "fleet" is stated to have consisted of—

1. The Tuscarora, a suitable ship for the service, which was ordered on the "5th September, 1862, to go to the West Indies in search of the Alabama and Florida."[1]

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[1] For the various orders given to these vessels, and alluded to in the course of this Annex, see the Synopsis of Orders given in the Appendix to the Case of the United States, vol. vii, opposite to page 120.

As Mr. Welles, in the same Report to Congress, stated that "the Tuscarora is now in pursuit of this pirate," (Alabama,) it may be taken that these orders were sent to her about the time that the Chippewa was ordered to relieve her at Algeçiras in watching the Sumter. The Chippewa was at Cadiz early in November, 1862. It may therefore be assumed that she relieved the Tuscarora about that time; but, as the Tuscarora was, in the months of November and December, cruising off Madeira; was at Gibraltar on the 31st December, 1862; at Cadiz on the 17th January, 1863; subsequently paid two, if not three, visits to Madeira; was again at Gibraltar on the 17th March,[1] and completed her cruise, it is presumed at some port in the United States, on the 13th April, (See Synopsis of Orders,) she could not possibly have put the orders into execution. The name of the Tuscarora does not appear in the returns of the United States ships-of-war that visited the British Islands in the West Indies during this period. This suggested a more careful and complete investigation into her case, which has resulted in proving conclusively that, in spite of the intentions of the Navy Department, she did not on or after the 5th September, 1862, "go to the West Indies for the Alabama and Florida," and that therefore she was not, on the 1st December, 1862, the date of Mr. Welles's Report, in pursuit of the Alabama.

2. The Vanderbilt, a suitable vessel when supplies of coal were procurable, then cruising in the track of vessels bound to and from Europe; of her proceedings on this cruise nothing further is known.[2]

3. The San Jacinto, a suitable vessel, then in the West Indies; the Alabama had on the previous 18th November escaped from her at Martinique.

4. The Mohican, a suitable vessel; she could not have left the United States on the "belligerent" mission of capturing the Alabama, as on the 14th November, 1862, when applying for coals at Bermuda, to enable him to go to the eastward, her commander, Captain Glisson, assured Governor Ord that "he was not directly engaged in any belligerent operations against the Confederate States, but was proceeding to a foreign station in the performance of an ordinary duty." (Appendix to the British Case, vol. v, p. 32.)

5. The Dacotah, a suitable vessel; she had ceased her pursuit by 17th November, (see Synopsis of Orders,) although Mr. Welles named her as being still in pursuit.

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[1] For record of visits to Gibraltar, see Appendix to British Case, vol. v, p. 229. The dates of the visits of these and other vessels to foreign ports, mentioned throughout this Annex, are recorded in returns from British Consuls, Mail Agents, &c., which can be produced for the satisfaction of the Arbitrators, if so desired.

[2] It is more than probable, from indications met with in tracing out the proceedings of other United States cruisers, that, had time permitted, good reasons would have been discovered for suggesting abatements on account of this cruise, the claim for which is at the rate of nearly $1,500 a day. Indeed, it might be equally desirable to endeavor to trace out the proceedings of other vessels, which are wholly unknown, except so far as stated in the synopsis of orders, such as the Augusta, Ticonderoga, &c.; the claims on their account were necessarily treated, in the former report, as admissible in the hypothetical sense there explained, but further light might discover, as in so many other cases, errors which would justify abatements.

6. Onward.
7. Sabine.
8. Ino.
9. St. Louis.

} Sailing-vessels, obviously useless in pursuing the Alabama, and whose employment on such service was condemned by the United States Ministers abroad, *e. g.*, by Mr. Dayton (quoted in the Report of Admiralty Committee, Appendix to the British Case, vol. vii, p. 58,) by Mr. Adams in his dispatch[1] to Mr. Seward, 12th May, 1864, after a conversation with Prince de Joinville on the inutility of United States sailing-ships in European waters, &c. Similar opinions were expressed by the captains of the Constellation, St. Louis, &c.

Admiral Wilkes's flying squadron could not, from a previous mention made of its special duties in the same Report, p. vi, have been included in Mr. Welles's "fleet."

It is thus seen that, excepting the Tuscarora, Mohican, Dacotah, and the useless sailing-ships, Mr. Welles's "fleet" is reduced to two vessels, although at the time he could boast of having increased the United States Navy to 427 vessels, and 28,000 men!

Turning now to the ships in pursuit when Mr. Welles made his next Report to Congress, viz, on the 7th December, 1863, the Alabama then being in the height of her career, the Synopsis of Orders gives the following ships as so engaged:

1. Vanderbilt; but on the 27th of October she had abandoned the pursuit,[2] and on the 7th December was making her way back to the United States.

2. Mohican; this ship, which, as will be subsequently shown, commenced her pursuit of the Alabama on the 9th May, 1863, from the Cape de Verds, also, on the 11th December, 1863, abandoned the pursuit at the Cape of Good Hope, and turned her head westward. She was at St. Helena on the 29th December, on her way back to the United States.[3] Had she remained at or near the Cape, or the Mauritius, or gone to Bourbon (where she could have coaled) for a few weeks, she would have learnt that her chase had gone to the East Indies. Instead, however, of so doing, her captain retraced his steps homeward, in spite of communications he had received when at Cape Town, and which called forth these observations from the United States consul at the Mauritius in a dispatch to Mr. Seward of the 5th February, 1864: "The narrative of these things affords another illustration of the necessity of a man-of-war in these waters. * * * * When the Mohican was at Cape Town, especially as the facts concerning the Sea Bride had been communicated by me to the consul there, and were by him laid before the captain of the Mohican, it seems unaccountable that that vessel did not extend its cruise to Madagascar and Mauritius. It is to be hoped that Captain Glisson had sufficient to justify his conduct in

[1] The following is an extract from Mr. Adams's dispatch:

"The Prince de Joinville, who called on me the other day with a letter to you, which I had the honor to forward by the last steamer, made some remarks on the effect of the presence of our sailing-ships in European harbors in a perfectly friendly spirit, which were not without their weight in my mind. I have a fear that these vessels entail a heavy burden of useless expense, and retain in utter inactivity a considerable number of the best class of our useful seamen. It would be quite as well for the country if they were entirely withdrawn. One steamer like the Kearsarge has more influence upon the opinion of nautical men than all the obsolete frigates remaining in the world would, put together. Three or four such, properly distributed, with good officers, would materially check the tendency to serve on board of dubious rebel ships." Dip. Cor., 1864, Part i, p. 732.

[2] See Appendix to British Case, vol. vii, p. 70.

[3] Ibid., vol. v, p. 234.

turning back. Still, I can but hope that some other vessel from our now very large navy may very soon appear in the Indian Ocean."[1]

3. Onward.
4. Ino. } The sailing-ships already disposed of.
5. St. Louis.

6. Rhode Island, stationed off the Bahamas, and, like the De Soto, performing precisely the same duties as Admiral Wilkes's flying squadron, (see *post*, p. 88.)

7. De Soto; the same off the Havana, (Appendix to British Case, vol. vii, p. 74.)

8. Wyoming. This ship, with the sailing-sloop Jamestown, represented the United States interests in the East Indies, China, and Japan, and had, of course, the ordinary duties of this extensive station to carry on; she was, at the very time Mr. Welles was making this Report, well placed to intercept the Alabama, being near the Straits of Sunda when the latter passed through them. The Wyoming's further proceedings will be subsequently dealt with.

It is thus seen that, within a very few days of the date of Mr. Welles's Report, the chase, pursuit, or search for the Alabama was practically reduced to one efficient ship, the Wyoming, and she, as will be elsewhere shown, virtually, on the 13th of the following February, gave up the pursuit, or did what, as far as any claim on account of the Alabama is concerned, amounted to an abandonment. Finding the Confederate had probably left the limits of his station, her commander conceived the orders he was then acting under did not justify him in following the Alabama beyond such limits. And yet, at this time, Mr. Welles could justly make the yet prouder boast that the United States Navy consisted of 588 vessels and 34,000 men, exclusive of officers!

From this period to the date of the Alabama's being sunk, the chase, pursuit, or search was confined to—

1. The Sacramento, a suitable vessel, ordered, on "the 18th January, 1864, to cruise to the Cape de Verds, Brazil, Cape of Good Hope, and thence to the eastward, or to Europe, according to news of the Alabama."

She was at Table Bay from the 29th April to the 5th May.[2] Learning there, doubtless, that the Alabama had sailed on the previous March for a French port, she followed her to Europe, and was at Lisbon on the 29th of June; it has not yet been ascertained on what day she arrived there, but fifty-six days would seem to have been a very long passage for a powerful full-rigged ship like the Sacramento, with a speed under steam of 12¼ knots, to have made in time of war and in the actual pursuit of an enemy. She may, therefore, have arrived at Lisbon some time before the 29th June, or have touched at some other European port. Although probably in want of stores and supplies, she does not appear to have called at Cadiz, which was then the depot for the United States ships.

2. The Kearsarge, from the time she left Flushing till she sunk the Alabama.

3. The Wachusett, a suitable vessel, and ordered apparently to limits judiciously chosen to intercept the Alabama on her return westward. She was, however, so frequently to be found during this period in the ports of Brazil, that she could have spent but little of her time in cruising near the equator. The Alabama, on the 2d May, 1864, (having for ten days previously been on the track of the homeward-bound Pacific

[1] Appendix to Case of the United States, vol. i., p. 250.
[2] Appendix to British Case, vol. v, p. 228.

ships,) was, according to Admiral Semmes, at "our old toll-gate at the crossing of the 30° parallel, where, as our reader will recollect, we halted on our outward passage and *viséd* the passports of so many travelers. The poor old Alabama was not now what she had been then. Her commander, like herself, was well-nigh worn down." ("Adventures Afloat," p. 749.) Where was the Wachusett about this time? At Bahia on the 31st March, at Pernambuco on the 27th April, at Bahia again on the 13th May and on the 11th June. It would seem from the translation of a dispatch from Mr. Webb to the Brazilian Minister for Foreign Affairs of the 16th of October, 1864, given at page 142 of the first volume to the Appendix of the British Case, that her commander was then more concerned in opposing the wishes of Mr. Webb and the United States Consul at Bahia than in following up the "rebel" cruisers. The claim on this ship's account has been considered admissible for the Arbitration, (in the sense explained in the Admiralty Report;) but it will be hereafter shown that subsequent investigation warrants the suggestion that a considerable abatement should be made from it.

4. The Niagara, a suitable vessel; but the postscript to the Admiralty Report will have shown that this ship was sent to European waters on account of the iron-clads and corvettes which were being built in France for the Confederates.[1]

It is therefore clearly demonstrated that, when the Alabama was sunk, the United States cruisers in actual search of her (including the Wachusett and also the Kearsarge for nine days) were only three, out of a navy which by this time must have numbered over 600 vessels.

FLORIDA.

Pursuing the same course of inquiry, and only incidentally alluding to the acts of remissness on the part of United States cruisers in regard to the Florida, viz: allowing her to get through the blockading squadron into Mobile; allowing her again to pass the blockading squadron, and get out again; it will be found that, at the date of Mr. Welles's Report to Congress of 1862, no cruisers were in pursuit of that Confederate vessel, then blockaded in Mobile; nor, indeed, does the United States Counter Case contend that the pursuit in her case was effective. It simply states "that it is scarcely necessary to say that the United States deny the allegations regarding the supposed negligence of their Navy."

The Tuscarora, as already shown above, was never in the West Indies in pursuit of the Alabama or Florida, although she was ordered there for the purpose.

On her escape from Mobile, the R. R. Cuyler—a suitable vessel—was sent by Admiral Farragut in pursuit of the Florida, and continued to cruise for seventeen days. It is not known that there is any official account of her cruise published; but a letter,[2] purporting to be from an officer on board, and dated 21st January, 1863, "off east coast of Yucatan," after mentioning that they had pushed on to Cape Antonio, but had lost sight of the chase, proceeds:

"Had the Oneida accompanied us, as she was ordered to do, our chance would have been double what it was. * * * * *

"There were seven vessels of us off the port, (Mobile.) We had fifteen hours' warning, and her (the Oreto) only way out was through the main ship-channel, which, at the bar, is less than a mile wide. * *

[1] Appendix to British Case, vol. vii, p. 110.

[2] Putnam's Record of the Rebellion, vol. vi, p. 392.

"Everything was done to increase our speed, but the utmost was 12½ knots. I have seen the ship go 14.

"The prime cause of her escape was neglect to prepare for her; and remembering Commander Preble's case, I think the Department will soon decide where the fault lies."

At the date of Mr. Welles's next Report of Congress, on the 7th December, 1863, there was not a single vessel in special pursuit of the Florida, nor had there been any sent during the previous twelve months, except those already named.

From this date to that of the Florida's seizure in the Port of Bahia by the Wachusett, the following were sent in pursuit of her:

1. The Ticonderoga—a suitable vessel—which appears to have been withdrawn from the protection of the Fisheries, on tidings that the Florida had re-appeared off Bermuda, in June, 1864. She touched at Barbadoes on the 8th August,[1] but nothing further is known of her proceedings.

2. The Pontoosuc—a suitable vessel. She appears to have been the only vessel of those out on the 12th and 13th August, 1864, in pursuit of the Tallahassee, whose orders embraced also the Florida.

3. The Niagara—a suitable vessel—but, as already shown above, she was not sent in pursuit of the Florida; further references to the same effect will be given below.

It is thus seen, if no "great efforts" were made and no "fleet" was dispatched to capture the Alabama, still less were any serious efforts made to capture the Florida; and this assertion is advanced with a full recollection of the intermittent and fitful attempts made by the Kearsarge to blockade her in, and capture her after leaving, Brest, in the performance of the ordinary duties incidental to a state of war, and when, as shown by the synopsis and her actual proceedings, the Kearsarge was not detailed for the actual pursuit of any of the Confederate ships in Class I of the Admiralty Report.

None of the sailing-vessels are stated to have been sent expressly in pursuit of the Florida. Her escape from the Saint Louis at Madeira on the 29th February, 1864, is, however, a further apt illustration, if further proof could possibly be needed, of the utter unfitness of the sailing ships for the service of following up these vessels. "I have little hopes (said Captain Preble) of bringing her to action with my canvas wings, though I shall follow her to sea, if practicable, and try," with what result might easily have been divined.[2]

GEORGIA.

The United States, in their Counter Case, sec. vii, par. 5, state that, "when Her Majesty's Government made the statement that no serious endeavor to intercept or capture the Georgia appears to have been made on the part of the United States, it was mistaken." No trace, however, of any such endeavor appears in the synopsis of the orders to the United States cruisers, where she is not even named; and the only ship known to have gone in pursuit of her was the Niagara, which captured her when it was notorious she had been dismantled and sold, and was chartered as a merchant-ship to the Portuguese Government.

There is no act of special remissness on the part of any United States cruisers averred in reference to the Georgia. It would seem, however, from the translation of a letter addressed on the 21st May, 1863, to Mr.

[1] Appendix to British Case, vol. v, p. 226.
[2] Diplomatic Correspondence, 1864-'65, Part iv, p. 297.

Webb, the United States minister at Rio, by a Mr. Grebert, an "intelligent German gentlemen,"[1] that the Mohican had been in sight of the Georgia off St. Vincent, but it would not appear that she followed her up. Mr. Grebert stated, "We were informed at Saint Vincent, Cape de Verds, that a few days before our arrival, a steamer had appeared in sight of the port, but had immediately disappeared. It is supposed that this steamer must have been a secessionist privateer." Mr. Grebert had previously said that the Mohican was at Saint Vincent, and that he "there gathered information that in the neighboring waters another vessel of war was cruising, supposed to be the Vanderbilt;" but at that time the Vanderbilt was Admiral Wilkes's flag-ship in the West Indies.

Mr. Grebert arrived at Bahia on 14th May, and there "an officer of the Georgia told me that the Georgia had been seen at Saint Vincent; but went higher up, (*qy.* to a higher latitude?) when she discovered the Mohican in the port of Saint Vincent."

It is, therefore, very probable that the steamer supposed to have been the Vanderbilt was the Georgia, and that the Georgia made out the Mohican in the harbor, although the latter failed to see the Georgia.

Mr. Webb, in a letter to Mr. Seward of 23d June, 1863, showed evidently that he was not satisfied with the zeal shown on another occasion by the Mohican, though he suggested that her commander "may have been misled by some cunningly devised report." He indulged in the hope that the converted merchant sailing-vessel Onward might be more successful than the Mohican had been in the search for the Alabama, Florida, and Georgia, all then on the coast of Brazil.[2]

SHENANDOAH.

"The United States, as to the Shenandoah, make the same statement which they have already made in reply to the statements of Her Majesty's Government touching attempts to intercept or capture the Georgia."—United States Counter Case, sec. viii, par. 5.

No mention is made, in the Synopsis of Orders, of this ship; and it is nowhere stated that any United States vessel was ever sent in search of her.

Without again going over the same ground with regard to the Niagara, Sacramento, &c., it may be confidently stated that the Iroquois was the only vessel which, it could possibly be suggested, was ever in pursuit of the Shenandoah.

Putting aside, for the moment, the fact of her orders referring to "rebel privateers" generally, a comparison of dates and a slight examination of facts will show that this ship's actual proceedings had no reference whatever to the Shanandoah.

TheIroquois received her orders "to leave European waters, and cruise off Madeiras, Brazil, Cape of Good Hope, and to Batavia, East Indies, for rebel privateers," about the middle of September, 1864.

These orders from the Secretary of the Navy would, therefore, probably have been dated about the 1st September. It was then known at Washington that the only Confederate cruiser at sea was the Florida, the fate of the Alabama, and the sale as a merchant-ship, though not the capture, of the Georgia, being also known to the Navy Department; her capture must, however, have been known to the Iroquois when the orders reached her.

The Iroquois left Portsmouth on the 17th September, 1864, and finally

[1] Appendix to British Case, vol. i, p. 282. [2] Ibid., p. 287.

quitted England on the 23d September, having gone to Dover to provision.[1]

She was then stated by her Captain to be "about to sail for a station remote from the shores of Europe."[2]

At this time nothing was known of the Sea King, or Shenandoah; no mention was made of her until six weeks afterward, when Mr. Dayton, writing from Paris, informed Mr. Seward that he had advised Captain Craven, of the Niagara, not to follow the Sea King, as he had "little confidence" in the reliability of the reports from Mr. Morse, the consul in London;[3] this was ten days before any communication was made respecting her by the United States Legation to Earl Russell.

The Shenandoah was commissioned at Desertas on the 20th October, made several prizes off the Coast of Brazil, then proceeded to Melbourne without touching at any port *en route*, and arrived there on the 25th January, 1865; she, however, called off the Island of Tristan d'Acunha, and landed some crews of prizes she had taken and destroyed.[4]

On the day following her arrival at Melbourne the Mail left for Europe, taking without doubt newspapers giving accounts of her arrival, as well as the reports to that effect which the United States Consul stated he then sent to Mr. Adams, and to the United States Consul at Hong-Kong.[5]

The Iroquois, following out her orders, was at Table Bay 9th January, 1865, and at Mauritius 29th January, 1865.[6]

As it could not have been known at either of these ports at the respective dates that the Shenandoah had gone to the eastward of the Cape, it is clear that, not only could the Iroquois' orders have had up to this date no reference to the Shenandoah, but that her movements could not have been influenced by any tidings she could have heard at either of these places of that vessel's movements.

It is true that the Iroquois is reported to have called at Tristan d'Acunha on her way from the Brazils, and taken the crews of the prizes, who had been left there by the Shenandoah, to the Cape, but it is hardly probable they were able to give the commander of the Iroquois any clue to the Shenandoah's future proceedings, and, in fact, the Iroquois was officially reported as having left the Cape for Batavia, showing that no deviation from her orders was then contemplated in consequence of any such clue. She coaled neither at the Cape nor at the Mauritius, although three months had elapsed since she had been to a British port; hence it may be inferred she was not pressing on in actual pursuit of any particular ship, but was making her passages leisurely under sail.

It is not probable that the Iroquois, on arrival at Ceylon on the 17th February, received any special orders from the Navy Department relative to the Shenandoah, as on the 14th of the previous month Mr. Seward had officially informed Her Majesty's Chargé d' Affaires at Washington that "a reliable representation" had been made to the Department "that the Shenandoah will be found in the neighborhood of Bermuda."[7] Again, Mr. Seward, in writing to Mr. Adams nearly a fortnight later (on the 27th) upon the subject of the Shenandoah's captures off the coast of Brazil, made no reference to special orders being sent to any cruisers,[8]

[1] Appendix to British Case, vol. v, p. 224.
[2] Diplomatic Correspondence, 1864–'65, Part ii, p. 302.
[3] Ibid., Part iii, p. 172.
[4] Appendix to British Case, vol. i, pp. 499, 658.
[5] Appendix to Case of the United States, vol. vi, p. 588.
[6] Appendix to British Case, vol. v., pp. 228, 233.
[7] Ibid., vol. i, p. 498.
[8] Appendix to Case of the United States, vol. iii, p. 335.

nor is any mention made in the synopsis of further orders being sent to the Iroquois, as in other cases when the cruisers received fresh in structions.

Had she obtained any inkling from the crews of the prizes taken from Tristan d'Acunha that the Shenandoah was likely to have made the Straits of Malacca and their neighborhood her cruising-ground, it would seem to have been at once the proper and the natural course of the Commander of the Iroquois to have filled up with coals at the Cape, and pushed on forthwith to Batavia, replenished coal, and then to have proceeded to the Confederate cruiser's expected cruising-ground, within which, in three months from leaving the Cape, he could again have coaled either at Singapore or Penang.

It will have been seen that, on arriving at Ceylon, the Iroquois would probably have heard through the newspapers of the arrival of the Shenandoah at Melbourne. It would, however, seem that she staid there eight days to take in but 150 tons of coal;[1] and, instead of proceeding at once to Melbourne, to endeavor, through personal communication with the United States Consul, to get on her track, the Iroquois went to Penang, from whence, on or about the 2d March, 1865, the senior British naval officer in the Straits of Malacca reported to his commander-in-chief, Vice-Admiral Kuper, then in China, that "the United States sloop Iroquois has appeared at Penang, with the avowed intention of endeavoring to intercept the Confederate cruiser Shenandoah."

On the 29th May, 1865, she is reported to have been at Singapore, and still in search of the Confederate steamer Shenandoah.

She was thus probably for nearly three months in the Straits of Malacca and its neighborhood—in fact, near Batavia—the destination indicated in, and therefore it may be presumed obeying, her original orders, which, as before stated, could have had no reference to the Shenandoah.

In June or July she must have quitted her station, for on the 12th August, 1865, she was at the Cape on her way back to the United States. This step of returning homeward could have had no reference to the Shenandoah.

She called at St. Helena on the 25th August, 1865. While there, her commander informed the Governor that he had taken off from Tristan d'Acunha the people landed from the Shenandoah and conveyed them to the Cape of Good Hope in the early part of that year; and, also, that "he had been to the eastward in search of the Shenandoah, and believed she had proceeded to the Pacific, where it was to be apprehended she might do some mischief among the American whalers in those regions."[2]

On a full review of these facts, and with the light thrown on the Iroquois's proceedings by this conversation of her commander with the Governor of St. Helena, it cannot be seriously contended she was ever in actual or even constructive pursuit of the Shenandoah. She left England with no such orders; it is not averred in terms that she or any other United States cruiser ever had such orders; she never deviated substantially from the orders laid down for her guidance before proceeding to her "distant station;" while on that distant station she never went far from Batavia, the final point named in her orders; and her commander avowed that he quitted the station with the belief (as was the fact) that the Shenandoah was destroying whalers in the Arctic seas. Surely no proceedings can be less unlike "pursuit" than those of the Iroquois; that her officers should, while in the Straits of Malacca, have named the Shenandoah as the then special object of their quest,

[1] Appendix to British Case, vol. v, p. 229. [2] Ibid., vol, v, p. 229.

was natural, since she was then the only "rebel privateer" known to be in existence, and they would have said so in good faith, but of course with no notion that the whole cost of their cruise was to be eventually claimed from Great Britain. If such a claim were admissible, a similar claim would be equally admissible on account of every United States ship of war of sufficient force then in commission, since, if the Shenandoah had fallen in the way of any such ship, it would have been the duty of that ship, as it was that of the Iroquois, to capture her; but this is not, cannot be, "pursuit." It is therefore obvious, from this further investigation, that the Admiralty Committee were fully justified, on every ground, in considering as inadmissible the claim made on her account.

The claim made in the United States Case for the pursuit of the Shenandoah, the asseveration in their Counter Case that "Her Majesty's Government is mistaken in its belief that no endeavor to intercept or capture the Shenandoah appeared to have been made by the Government of the United States," and the large sum involved in this claim, amounting, without interest, to no less than $329,865.08, will, it is hoped, afford good and substantial grounds for thinking that the labor and research expended in the investigation of this particular case have not been fruitless.

INADEQUACY AND WANT OF CONCERT OF UNITED STATES NAVAL FORCE ABROAD, ETC.

The United States ministers abroad were constantly calling the attention of their Government to the inadequacy of their naval forces to arrest the career of the Confederate cruisers. Messrs. Adams, Dayton, Pike, Perry, Webb, Harvey,[1] one and all at different times dwell on this theme; but when the letters on the subject (and many of the consuls made similar representations) were referred to Mr. Welles, he may be said to have acted always as if he regarded this question as wholly subordinate to that of the blockades; hence it is seen that the most suitable vessels were taken from the pursuit to re-enforce the blockading squadrons, without regard to the injury which the depredations of the Confederate cruisers were inflicting on the United States commerce. Sometimes he explained that it was want of men which prevented him from sending a greater force in pursuit;[2] but with the number of seamen at his disposal, 28,000 in 1862 and 36,000 in 1863, exclusive of officers, this excuse would seem to be of little avail when the facts are sifted. However, besides this notorious inadequacy of force to compass the ends which it is submitted the United States Government ought to have had in view, and to have considered a necessary, if not the first, duty, there were other causes in operation which are disclosed sufficiently in the correspondence laid before Congress and the House of Representatives, and which tended to impair the efficiency of the small force detailed for this special service; they were—

(*A.*) The absence of any communication to many of the different legations of the movements of the several men-of-war in European waters, of which there are many complaints.

(*B.*) The fact that there was no naval head or senior officer in European waters; each ship appeared to act independently and for itself; there was a consequent absence of all concerted action.

[1] For instances, see Diplomatic Correspondence, 1862–'63, part ii, pp. 902, 980, 1278; 1864–'65, part iii, p. 323; part iv, pp. 275, 302, 319, 325; 1865–'66, part iii, p. 102.

[2] Diplomatic Correspondence, 1864–'65, part iii, p. 42.

From these causes combined, which may be abundantly proved from the United States documents, and which were—

(*a.*) Insufficiency of force;

(*b.*) Ignorance of movements of the ships on the part of United States Ministers;

(*c.*) Independence of action on the part of each ship;

it may fairly be inferred that the United States Government did not "actively and diligently exert their naval power" to arrest the course of the Alabama or the other Confederate cruisers.

ERRORS IN THE SYNOPSIS OF ORDERS.

Frequent reference is made in the Report of the Admiralty Committee and its Appendices, as well as in this paper, to errors in the synopsis of orders; a few fresh illustrations may not be inapt:

(*a.*) The Chippewa is stated to have been watching the Sumter at Algeciras to the 30th May, 1863. Now not only, as is well known, had the Sumter left Gibraltar as an unarmed ship on the previous 8th of February,[1] but the Chippewa was herself with some of Admiral Wilkes's ships in the West Indies, at Cape Haytien, on the 21st May, 1863, and at Nassau, "from St. Thomas," on the 26th May.[2] She had been at Cadiz on the 12th February, and again in March, and she was at Madeira in April; hence the synopsis must be in error in stating that she was watching the Sumter at Algeciras to the 30th May, 1863.

(*b.*) The Kearsarge.—In the admiralty report it has been noticed with reference to this ship's orders of 30th September, 1862, "to capture the Rappahannock or other rebel privateers in European waters," that the synopsis must be in error.

Mr. Welles, in his report of the 1st December, 1862, stated, at "last advices (she) was also in pursuit of the 290," (page 23.)

In the United States Case she is stated to have been at Gibraltar with the Tuscarora, watching the Sumter, and it is implied that this was continued till that vessel's sale.

The Kearsarge was, in fact, about the time to which Mr. Welles must have referred to, viz, on the 30th September and on 3d November, watching the Sumter at Gibraltar,[3] and on the 4th November she was at Cadiz; she was certainly not in pursuit of the Alabama, which vessel was then in the West Indies.

(*c.*) Ino.—There is a claim on behalf of this sailing-ship for fifteen months for convoying the Aquila with the monitor Camanche on board. Now the Camanche, on the 1st February, 1863, was building at Jersey City, and on the 14th March of the following year, was at San Francisco, California.[4] It seems more probable that there is a further errror in the synopsis than that this service should have taken fifteen months to perform.

(*d.*) Juniata.—From the synopsis of orders, the dates given, and the amount of the claim on her behalf, it would be inferred that this ship commenced her service with Admiral Wilkes's squadron on the 4th December, 1862; whereas she did not leave the United States for nearly five months after that date. A correspondent of the New York Herald, writing on the 22d January, 1863, says that the Juniata,

[1] Appendix to British Case, vol. ii, p. 57.

[2] United States Navy Report, December, 1863, p. 557; Appendix to British Case, vol. v, p. 225.

[3] Appendix to British Case, vol. v, p. 229.

[4] United States Navy Registers for 1863 and 1864.

which had been under sailing orders since November, was still at Philadelphia, being detained by a defect in her machinery, (New York Herald, January 26, 1863.) She went to Fortress Monroe on the 17th March, and sailed for the Havana on the 25th April, 1863, (see New York Herald of that date.) The United States Navy Register for 1863 shows that on the 1st February, 1863, she was in Hampton Roads, and not with the West India squadron.

(*e.*) The Connecticut.—To cruise between Bermuda and Nassau to watch for the Sumter from 3d August, 1863, to 7th September, 1863.

This claim is made for a period when the Sumter, as admitted in the United States Case, p. 88, had changed her character, and become the Gibraltar. She sailed from Liverpool on the 3d July, 1863, as a merchant-vessel without armament, with a cargo of warlike stores for Charleston,[1] and the Connecticut was doubtless employed to look out for her; but as she was then simply a blockade-runner, or a merchant-ship, with contraband of war on board, or both, it is clear that under no circumstances could this claim be admissible under the treaty.

(*f.*) *Ticonderoga.*—In a note in the appendix to the report of the admiralty committee,[2] attention is called to the fact that between May, 1863, and June, 1864, although her cost is claimed, no service is given in the synopsis of orders for the period. This was not an omission to specify the service, but an error in the dates and charges; as within the period, for which it would otherwise be inferred she was in pursuit of Confederate cruisers, she was actually under repairs (had "work done") at the navy-yards of Brooklyn; Charlestown, Massachusetts; Philadelphia, and Norfolk, respectively;[3] and she is shown in the Navy Register for 1864 as being on the 12th of March of that year "ready for sea at Philadelphia." Again, it is obvious that she could not have been employed in the Gulf of Saint Lawrence protecting the fisheries during the winter.

(*g.*) *Niagara.*—The claims on account of this ship and the Sacramento have been already dealt with in the admiralty report and its postscript on the grounds—

1. That they are generally inadmissible.

2. That they extend far beyond the existence, as confederate cruisers, of the vessels on account of which the claims are made.

3. That they extend to periods long after the cessation of hostilities.

But in addition to these fatal errors or objections to the claims, the following are also obvious errors:

4. Mr. Adams stated that the Niagara had left France for the United States on the 8th August, 1865;[4] the claim, however, embraces a period forty-four days beyond that date, although a vessel of her speed could hardly have occupied that time in making the passage across the Atlantic.

5. The Niagara accompanied the Russian squadron, which convoyed the remains of the Czarovitch from Lisbon to the North Sea, and for which act of courtesy the Russian government expressed itself deeply sensible and grateful to that of the United States; but, through a manifest error in the synopsis and in the claims, the cost of the ship for this period is claimed against the British Government.[5]

(*h.*) *Nereus.*—The claims for this ship on convoy service embrace a

[1] Appendix to Case of the United States, vol. vi, p. 203.
[2] Appendix to British Case, vol. vii, p. 75.
[3] United States Navy Report, December, 1864, pp. 1,005 *et seq.*
[4] Diplomatic correspondence, 1865–'66, part i, p. 572.
[5] Ibid., part iii, p. 127.

period during which she was employed with the fleet at the attacks on and final capture of Fort Fisher between 24th December, 1864, and 15th January, 1865.[1] She may have been employed on this service for a much longer period, and she, as well as her consorts in convoying duty, may have been often similarly withdrawn during the periods embraced in the claims, as it is only incidentally that errors of this character can, in the absence of complete information as to the orders and the movements of the United States cruisers, be discovered.

It is thus shown that there is a sufficiently large number of patent errors in the synopsis of orders to warrant its authority on matters of fact being questioned, when other data, generally derived from United States official documents, point to different conclusions. They are adduced with this sole object, as they generally refer to claims which have not been regarded as admissible (on the hypothesis explained in the admiralty report) under the treaty, and consequently it has not been thought necessary to give their money value.

ADMIRAL WILKES'S FLYING SQUADRON.

The total amount claimed for the services of this flying squadron, which originally consisted of one converted merchant-steamer, four second-class steam sloops, three paddle-wheel steamers, one sailing-ship, one sailing store-ship, and one sailing-ship occasionally, if not always, used as a coal-ship, is so large ($1,457,130) that it may not be thought an abundance of caution to add to the reasons which the admiralty committee justly looked on as conclusive why these claims should be considered wholly inadmissible:

1. The accounts of prizes captured by United States cruisers, which have been carefully examined, the returns of visits of United States ships-of-war to British West India Islands, and the incidental notices scattered here and there in the reports of the Secretary of the Navy to Congress, in other official papers, and in the newspapers of the day, abundantly prove that for the periods respectively claimed none of these ships, though the squadron is called "flying," proceeded beyond the limits officially designated by Mr. Welles as the "West Indies." When finally broken up under the command of Admiral Lardner, Admiral Wilkes's successor, Mr. Welles spoke of it as the "West India squadron;"[2] the term "flying" is an *ex post facto* designation.

2. The continuance of this squadron as an organization had no reference whatever to the confederate cruisers, but solely to the duration of the trade at Matamoras. Mr. Welles stated in his report of 7th December, 1863, (page viii,) that "the occupation of Rio Grande and Brownsville (13th November, 1863) has put a final termination to the lately extensive commerce of Matamoras, which is becoming as insignificant as it was before the rebellion."

Now at that date the Alabama, Florida, and Georgia were in being as confederate cruisers, and yet so little were their proceedings heeded in reference to this "flying squadron" that, taking the dates from the synopsis of orders, when that report was written the squadron had dwindled down to—

The Tioga, a paddle-wheel steamer of 809 tons;

The sailing-vessel Gemsbok, which was frequently, if not always, used as a coal or as a store ship;

And the sailing store-ship National Guard.

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[1] United States Navy Report, December, 1865, pp. 28, 77.

[2] Ibid, December, 1864, p. xix.

It cannot be supposed the Tioga was ever afterward detached from Admiral Lardner's squadron or sent in the actual pursuit of any of the confederate cruisers, (all then on the other side of the Atlantic,) since on the 24th March, 1864, she was off Elbow Light, (Bahamas,) and it may be assumed she was within the limits assigned to her by her orders until the claim on her account ceased, viz, 27th June, 1864.[1]

All the other vessels stated to have composed this squadron had, at different times, been previously withdrawn, and were afterward to be found attached to blockading squadrons.

The words "stated to have composed" are used intentionally, as it is impossible to reconcile the dates given in the abstract of the claims with those given elsewhere; for instance, in the case of the Juniata, as already shown, there is an error of nearly five months; in the Navy Register for January, 1863, the Gemsbok and the Oneida are shown as attached to blockading squadrons, and in that for January, 1864, the Tioga is named as attached to the East Gulf blockading squadron—duties palpably inconsistent with the pursuit of the confederate cruisers.

The claim on account of the Oneida commences on the very day (16th January, 1860) that she allowed the Florida to escape from Mobile. It is believed that after that date she continued to be employed in the blockade of that port, as she is stated in the Navy Register for 1863 to have been attached to the West Gulf squadron on the 1st February, 1863.

MISCELLANEOUS CASES,

Not affecting the claims considered by the admiralty committee as admissible (upon the hypothesis explained by them) for arbitration.

VANDERBILT.

It should be borne in mind that, notwithstanding her superior speed and armament, the Vanderbilt was an unfit vessel to send in pursuit of the Alabama, since she was wholly dependent on her steam-power; hence, after making a passage, if she could not replenish her coal, she was powerless; this explains parts of her proceedings.

On her way to the Cape she, in obedience to her orders, went to Fernando Noronha, Pernambuco, and Rio, there coaled, and notwithstanding she was in pursuit of an enemy remained in port nineteen days.[2] As a matter of fact, if she had staid there about five or six days and sailed on the 20th July direct for the Cape, (as she was ordered,) she would, instead of never meeting the Alabama, have found her in Table Bay.

From Rio she, however, went to St. Helena, there took all the coals she could get, (400 tons,) but on her arrival at Simon's Bay (where it was not known that she had been at St. Helena) she was again allowed to coal, taking nearly 1,000 tons.[3] After remaining eight days "painting ship," (so Semmes says in "My Adventures," page 668,) she again put to sea and went to Mauritius, where she was again allowed to coal, (though under what circumstances, or what representations her captain made to the governor, it is nowhere stated,) but there is another unaccountable delay in port of seventeen days;[4] she returned to Table Bay,

[1] United States Navy Report, December, 1865, p. 485; Appendix to Case of the United States, vol. i, p. 360.

[2] United States Navy Report, December, 1863, p. xxiv.

[3] Appendix to British Case, vol. v, pp. 228, 234.

[4] Ibid., p. 233.

and made arrangements to coal before obtaining permission; this was of course refused, and her coaling stopped, but not until she had taken nineteen tons on board. Then hearing, doubtless, that there was coal at Angra Pequeña, her captain went there and took possession of it, saying "he must have coal,"[1] and with this supply he went to St. Helena and Bahia, where doubtless he obtained a further supply, thence to Barbados and to the United States.

These facts prove:

1st. That the Vanderbilt was not fitted for the pursuit to such distant regions, where supplies of coal were limited, owing to her having no sail-power.

2d. That in addition to deviating from her orders she exhibited no haste in quitting some of the ports she touched at to carry on her pursuit.

SAN JACINTO.

Of this vessel's proceedings there are more full details than of those of any of the other United States cruisers, given in a letter of the Secretary of the Navy of 30th August, 1871, Appendix to Case of the United States, vol. vi, p. 345.

Semmes describes her as having a more powerful battery and double the crew, but that the Alabama had the "speed of her;" however, it may be assumed she was not an unsuitable vessel to have been sent in the pursuit; she was, as will be subsequently shown, withdrawn after being about two and one-half months on this service, and was afterward attached to the eastern blockading squadron.

If the arbitrators consider that she is proved, as stated at p. 138 of the British Counter Case, to have been remiss in allowing the Alabama to escape from Martinique, a question would then arise whether any portion of the claim made in her behalf was admissible, and whether such claim (if any) could be carried beyond the date of the Alabama's escape.

AUGUSTA.

Nothing is known of her cruise, which only lasted ten weeks, and consequently, though she was a suitable vessel for the service, she must necessarily have performed it in a very perfunctory manner. She does not appear to have called at Bermuda or any of the British West India Islands.

She was afterward employed in the North Atlantic blockading squadron.[2]

DACOTAH.

Also a suitable vessel; was withdrawn after but one month's service, and for the same service.

NIAGARA.

It may possibly be thought unnecessary to accumulate further proofs as to what was the actual employment of this ship, since the postscript to the admiralty report, and the United States official documents therein mentioned, will, it may be considered, have proved conclusively that she

[1] See "Correspondence respecting the capture of the Saxon by the United States ship Vanderbilt," laid before Parliament, (North America, No. 2, 1864,) pp. 1, 7, 12.

[2] See Navy Register, 1863; also, Navy report, December, 1863, p. 56, and Synopsis of Orders.

was not sent to Europe in pursuit of any of the Confederate vessels named in the United States Case, but to watch the vessels then being constructed for the Confederates in French ports. The claim, however, for this ship is so vast in amount, ($648,234,) that it is thought better, at the risk of being prolix, to give other quotations from United States sources which have been met with, and which are very pertinent to the contention that she never was engaged in pursuing the Alabama or Florida.

True it is that on the 28th April, 1864, Mr. Adams informed Mr. Seward that the Alabama was "reported at Cape Town, and about to come to France;"[1] and as the Niagara left the United States the end of the following month, it might be not unnaturally inferred that she was dispatched to Europe in consequence of these tidings, and hence that she was sent in pursuit of the Alabama; but a dispatch from Mr. Seward to Mr. Adams of the 28th May, when that of the 28th April must have been received, effectually disposes of this hypothesis. "The Niagara," Mr. Seward stated, "will go to Europe on Wednesday next. * * * We have adopted this policy, not alone on account of the naval expeditions with which we are threatened from British ports,[2] but also because we have not been able to procure entirely satisfactory assurances from the French Government," &c., about the vessels building at Bordeaux.

Mr. Adams had, two days before, (26th,) written to Mr. Seward to this effect: "My impression is that hereafter the base will be substantially transferred to the other side of the Channel," and he also refers to the four vessels in process of construction in France.[3]

Attention has been already called by the committee to the Niagara being "without orders." Mr. Harvey, the United States minister at Lisbon, writing to Mr. Seward on the 29th November, 1864, confirmed this curious and important fact in these terms: "In saying that I refer to the fact that the Niagara has been practically tied up for several months at Flushing, Antwerp, and the British colonies," (query, Channel,) "and, as is understood, waiting for orders which are to regulate her further movements."[4]

Can it still, in the face of the overwhelming evidence to the contrary, be seriously contended that from 30th May, 1864, to the 20th September, 1865, the Niagara "was cruising in the North Atlantic in search of the Alabama and Florida?"

MONEY CLAIMS—FURTHER ABATEMENTS SUGGESTED.

Where none are suggested the cruisers are not named.

TUSCARORA.

It has been already shown that she never went to the West Indies in pursuit of the Alabama and Florida, and consequently the amounts which were considered admissible, upon the hypothesis of the admiralty report, under the belief that she had carried out her orders, should be abated as follows:

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[1] Diplomatic Correspondence, 1864-'65, Part i, p. 641.

[2] Ibid., part ii., p. 60. At this time the only Confederate cruiser in a British port of the whole of those named in the United States Case was the Georgia, then dismantled, and known to be for sale; consequently, the "naval expeditions" which Mr. Seward was apprehensive of could not have consisted of any of the Confederate cruisers, which, by any possibility, could be considered to come within the purview of the treaty of Washington.

[3] Ibid., Part ii, p. 29. [4] Ibid., Part iv, p. 325.

Amount considered hypothetically admissible by the Committee		$89,765 58
Abatements suggested on account of the Alabama	$32,736 29	
Abatements suggested on account of the Florida	32,736 29	
		65,472 58
There would still remain a sum considered hypothetically admissible, which refers to a period of six weeks before the Alabama left Liverpool, and to another of four weeks during which the Tuscarora was visiting British ports; she finally went to Cadiz on the 2d September, 1863; amounting to		24,293 00

SAN JACINTO.

Reference has already been made to a letter from the Secretary of the Navy, giving details of this ship's proceedings; but it is by no means a full report, as no mention is made of her visit to Martinique, when the Alabama escaped from her, nor does it mention the fact that after this escape the San Jacinto was no longer employed in pursuit of the Alabama, but was attached, during a part of the period for which claims are made, to the East Gulf blockading squadron. This is shown in the Navy Register, where, on the 1st January, as well as on the 1st February, 1863, she is named as attached to this squadron, though the precise date at which she was withdrawn from the pursuit is not given. If the official Navy Register needed confirmation, it would be found in a correspondence from Key West of the 15th January, 1863, published in the New York Herald of January 27, which stated that "she (the San Jacinto) comes from St. Thomas for supplies, and will, I understand, be temporarily attached to the Eastern Gulf blockading squadron." Taking, however, the date given in the Navy Register, viz, 1st January, 1863, as the date of her withdrawal from the pursuit, the claims on her account would stand thus:

Amount considered hypothetically admissible by the Admiralty Committee	$65,421 43
Proportion now shown to be inadmissible	16,183 20
Amount that may now be considered hypothetically admissible	49,238 23

MOHICAN.

It has been already shown why this ship should be considered to have been performing the ordinary duties on a foreign station[1] until the 9th May, 1863, when she left the Cape de Verdes for the Brazils, and may be assumed to have commenced her pursuit of the Alabama. She eventually arrived at Table Bay on the 11th December, 1863.[2] Here, without waiting to ascertain where the Alabama had gone, which she might have done (if he could not remain at the Cape) by proceeding to Bourbon or to the Mauritius, her captain, like the commander of the Vanderbilt, gave up the pursuit, and on the 19th December turned his ship's head homeward, where he arrived in April, 1864. Although a very suitable ship for the pursuit, and although when she arrived in the United States the Florida, Alabama, and Georgia were on the high seas, she was withdrawn from this special service, and was afterward employed on the North Atlantic blockading squadron.

It is therefore clear, on these premises, that the (hypothetically) admissible claim on account of this ship could not extend beyond the

[1] That the Cape de Verdes was the foreign station to which the Mohican was proceeding in the performance of an ordinary duty when she called at Bermuda may be fairly inferred from her being there on the 21st December, 1862; 22d January, 1863; 20th February, 1863; 21st March, 1863; 22d April, 1863; leaving on the 9th May, 1863, for the Brazils.

[2] Appendix to British Case, vol. v, p. 228.

period embraced between the 9th May, 1863, when she may be considered to have commenced the pursuit, and the 19th December, when she abandoned it, the amount of which could not exceed—

Amount considered by the Admiralty Committee as hypothetically admissible	$258,310 32
Proportion now shown to be inadmissible	151,863 76
Amount that may now be considered hypothetically admissible	106,446 56

WACHUSETT.

Second cruise:

She was, as before stated, a suitable vessel, and her cruising-ground well chosen to intercept the Alabama when returning to Europe or again going south. Although she actually captured the Florida in Bahia, the Admiralty Committee considered itself justified, by the synopsis of her orders, in considering her as in search of the Alabama only; but, on the supposition that she was cruising near the line and making only occasional visits to Brazilian ports, it was of opinion that the claim was admissible up to the 19th September, thus allowing her three months to learn the fate of the Alabama. It turns out, however, as before stated, that the Wachusett spent a large portion of her time in port. The news of the sinking of the Alabama on the 19th June, 1864, was taken to the Brazils by the French packet which left Bordeaux on the 24th June and arrived at Rio de Janeiro on the 18th July, at which date the Wachusett must have learned the news, as she arrived at Rio de Janeiro on the 7th July, and did not leave until the 3d of the following month, when she sailed for Bahia and arrived there on the 12th August. Hence the claim on her account for the pursuit of the Alabama would cease on the 18th July. The fact of her remaining in port sixteen days after the news arrived and then going on to Bahia is a further proof that the Florida was not a special object with her. The claim on account of the Wachusett would stand thus:

Amount considered hypothetically admissible [by the Admiralty Committee	$145,936 66
Proportion now shown to be inadmissible	38,666 98
Amount that may now be considered hypothetically admissible	107,269 68

RHODE ISLAND.

This case is precisely the same as that of the De Soto, and although she did not happen to take as many prizes as that vessel, yet her actual positions from time to time can be sufficiently traced to prove that she never went in pursuit of the Alabama, but was continuously employed on the same kind of service as Admiral Wilkes's squadron, in the immediate vicinity of the Bahamas. In the Navy Register for 1st January, 1864, she is given as belonging to the West Indian squadron, and she was withdrawn from the service before the sinking of the Alabama, showing that her employment was not dependent on the Alabama's career or movements.

The Rhode Island's positions on the following days were:

12th May, 1863.....Hog Island, Bahamas.
21st–23d May, 1863.....Cape Haytien.
30th May, 1863.....Eleuthera, Bahamas.
16th August, 1863.....Latitude 27° N., longitude 76° W., (where she captured steamer Cronstadt, value, $301,940.)[1]

[1] Appendix to British Case, vol. v, p. 225; United States Navy Report, December, 1863, pp. 557, 567; Diplomatic Correspondence, 1864–'65, part ii, pp. 412 *et seq.*

31st August, 1863. .....St. Thomas.
16th September, 1863 ....St. Thomas.
16th October, 1863.....St. Thomas.

As she therefore never went in pursuit of the Alabama, the whole of the claim on her account is inadmissible, amounting to $177,972.66.

SACRAMENTO.

With reference to the Postscript to the Admiralty Report, it now appears, as before stated, that the Sacramento was at Lisbon on the 29th June, 1863, and must therefore on that day, if not before, either there or at some other European port, have heard of the fate of the Alabama. The (hypothetically) admissible claim on her account would consequently be subject to a further abatement of at least fourteen days, and would stand thus:

Amount originally considered hypothetically admissible by the Admiralty Committee	$112,295 22
Abatement suggested by the Postscript to the Report	6,535 70
Further abatement now suggested	8,318 18
Amount that may now be considered hypothetically admissible	97,441 34

WYOMING.

Until the middle of 1863 the Wyoming was the only United States vessel of war in the East Indies, including China and Japan, (the Jamestown sailing-sloop, sent to re-inforce her, being at the Cape on the 14th March.)[1] When the orders of the 26th January, 1863, were sent, as well as when they would have reached her headquarters, Macao, she had to perform the whole of the duties of this extensive station; and, in fact, in July of that year, the Wyoming attacked the batteries of Simonosaki, in consequence of an outrage upon an American ship;[2] hence, it would appear, she was not able to put the orders to proceed to the Straits of Sunda to watch for the Alabama into execution until the 25th September, 1863. She was at Singapore on 1st December, having been near the Straits of Sunda when the Alabama passed through, early in November, and where she had been for some time on the lookout for the Alabama.

After leaving Singapore she went to Rhio, where she remained long enough to receive a ball from the Dutch, and give one in return; and yet the Alabama had been burning ships almost within sight of her.[3]

She was at Labuan between 15th and 18th December,[4] "in search of the Alabama," and it is probable, judging from the dates, that she had a fair wind up the China Seas, that she called at Manila after leaving Labuan, and was repaired at the royal dock-yard at Cavite, as she was not at Hong-Kong until the 9th February.[5] Here she must have heard of the visit of the Alabama to Singapore; that she had left on the 23d December, going to the westward, and that she was off Malacca on Christmas Day. Now, the commander of the Wyoming must either, on the 9th February,

(*a*) Have given up the pursuit, or, (what amounts to the same thing, so far as any claim against Great Britain is concerned,)

[1] Appendix to British Case, vol. v, p. 228.
[2] United States Navy Report, December, 1863, pp. 558, 561.
[3] Semmes's Adventures Afloat, p. 708.
[4] Appendix to British Case, vol. v, p. 232.
[5] Ibid., p. 230.

(*b*) Have considered that he had fulfilled his orders; for, instead of going to the southward, he re-appeared at Hong-Kong on the 9th March.[1] At this time he probably received his further orders of the "21st November, 1863, to continue cruising until news of the destruction of the Alabama should reach her, then to return to the United States;" as in little over nine weeks (16th May) she was at Table Bay,[2] and her passage down the China Sea being against the southwest monsoon, she must have proceeded immediately on receipt of these further orders; but whatever chance there may have been, had she proceeded in February and not then practically have given up the pursuit, in March she had none. Indeed, it is abundantly clear that the Wyoming did not, when she arrived at the Cape, regard herself as in pursuit of the Alabama, but as simply homeward bound; since otherwise she would have followed the Confederate cruiser to Europe, which was known to be her destination. On the 28th April Mr. Adams (writing from London) informed Mr. Seward that the Alabama was "reported at Cape Town and about to come to France,"[3] information which he doubtless received from the United States Consul at the Cape; who would also, without doubt, have imparted it to the commander of the Wyoming on his arrival there in May; but instead of following up the Alabama until he heard of her destruction, (which, at all events, might have given a color to this part of the claim, which covers the cost of the passage of the ship from her station, China, to the United States,) he, notwithstanding his positive orders to that effect, appears to have made the best of his way to the United States.

It would thus seem that the period for which a claim could be made for this ship could not extend beyond the 9th February, 1864, when she practically abandoned the pursuit of the Alabama, and consequently the amount hypothetically admissible would stand thus:

Amount considered by the Admiralty Committee to be hypothetically admissible	$202,662 62
Proportion now shown to be inadmissible	110,363 14
Amount that may now be considered as hypothetically admissible	92,299 48

There are two or three noticeable and curious features connected with this claim:

1. The United States Minister at Japan seems to have had no expectation that the Wyoming would have quitted the station when she did; her doing so caused him great embarrassment.[4]

2. During the period for which claims are made against Great Britain, British men-of-war were assisting the Wyoming's consort (a sailing vessel) on the station, and receiving the thanks of the United States Government; for instance:

When the Jamestown, the consort herself, was ashore near Yeddo in October, 1863;

When the Encounter took an American consular prisoner from Japan to Shanghai in January, 1864;

Her Majesty's steamer Perseus assisting the American bark Maryland, ashore in Japan, &c.[5]

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[1] Appendix to British Case, vol. v, p. 223.
[2] Ibid., p. 228.
[3] Diplomatic Correspondence, 1864-'5, Part I, p. 641.
[4] Diplomatic Correspondence, 1864-'5, Part III, pp. 447, 493, 517.
[5] Ibid., Part I, p. 310; Part II, p. 197; Part III, p. 592.

CONCLUSIONS.

From these premises the following results are deducible:

(*a.*) That on the 1st December, 1862, only two suitable vessels were in the actual pursuit of the Alabama.

(*b.*) That on the following December the two were reduced to one.

(*c.*) That when she was sunk, there were only three, including the Kearsarge.

(*d.*) That there were never more than three effective vessels in search of the Alabama at any one time.

(*e.*) That during the months of February, March, and April, 1863, there was no effective vessel in pursuit.

(*f.*) That the average number of United States vessels in pursuit, while the Alabama was pursuing her career, was less than two.

(*g.*) That the United States Navy was increased from 400 to 600 vessels during this period; a considerable proportion of which were suitable vessels.

(*h.*) That on the 1st December, 1862, no vessels were in pursuit of the Florida.

(*i.*) That on the 7th December, 1863, no vessels were in pursuit of the Florida.

(*j.*) That on the 7th October, 1864, when captured at Bahia, two vessels were in pursuit of her, exclusive of the Wachusset.

(*k.*) That no United States cruiser was sent in special pursuit of the Georgia.

(*l.*) Nor of the Shenandoah.

(*m.*) That the claim for the conditional arbitration considered admissible (upon the hypothesis explained in the Admiralty Report) on account of the Alabama should be accordingly further abated by $536,104 21

(*n.*) On account of the Florida 32,736 29

(*o.*) On account of the Sumter, (*see* Connecticut, p. 83) . 26,651 00

(*p.*) And the hypothetically admissible amounts so corrected would stand thus:

For the four Confederates in Class I $940,460 24

For the Alabama only 891,580 82

For the Florida only 48,879 42

P. S.—With reference to the note on page 351 as to the cruise of the Vanderbilt, it would appear from announcements in the New York Herald during the months of November and December, 1862, and January, 1863, that this vessel was at least 20 days in ports of the United States during those months. The following are the dates of her arrival and departure: Sailed from New York November 6, 1862; returned November 30. Sailed again December 11, and returned to Fortress Monroe January 17, 1863, from whence she did not sail again till after the 28th of the same month, when she left with the Weehawken monitor in tow. This suggests a still further abatement of $30,000 in the claim for this vessel, reducing the total amount, hypothetically considered admissible for arbitration on account of the Alabama, to $361,580.82, and that for the four vessels Class I to $910,460.24.

III.

SUPPLEMENTARY STATEMENTS OR ARGUMENTS

MADE BY THE

RESPECTIVE AGENTS OR COUNSEL

SUBSEQUENTLY TO

FILING THE ARGUMENTS ACCORDING TO THE PROVISIONS OF THE TREATY.

CONTENTS.

I. Statement of Sir Roundell Palmer, June 27th, 1872.
II. Reply of the Counsel of the United States to the same.
III. Argument of Sir Roundell Palmer on the points mentioned in the resolution of the Arbitrators of July 25, 1872. Filed July 29, 1872.
IV. Argument of Mr. Evarts in reply to the argument of Sir Roundell Palmer.
V. Argument of Mr. Cushing in reply to the argument of Sir Roundell Palmer.
VI. Reply of Mr. Waite to the argument of Sir Roundell Palmer on the special question of the supplies of coal.
VII. Argument of Sir Roundell Palmer on the question of the recruitment of men for the Shenandoah, at Melbourne.
VIII. Observations of Mr. Cushing concerning the enlistments for the Shenandoah, at Melbourne.
IX. Argument of Sir Roundell Palmer as to the legal effect of the entry of the Florida into Mobile.
X. Reply of the Counsel of the United States to the argument of Sir Roundell Palmer on the special question of the legal effect of the entry of the Florida into Mobile.
XI. Argument of Sir Roundell Palmer on the claim of the United States for interest.
XII. Reply of the Counsel of the United States to the argument of Sir Roundell Palmer on the question of interest.
XIII. Comparative Tables presented by the Agent of the United States on the 19th of August, 1872, in compliance with the request of the Tribunal.
XIV. Tables presented by the Agent of Her Britannic Majesty on the 19th of August, 1872, in compliance with the request of the Tribunal.
XV. Reply of the Agent of the United States to the new matter introduced by the Agent of Her Britannic Majesty on the call of the Tribunal for elucidation in respect to the Tables presented by the two Governments.
XVI. A note on some observations presented by Mr. Bancroft Davis, on the 29th of August.

I.—STATEMENT OF SIR ROUNDELL PALMER, MADE AT THE SEVENTH CONFERENCE, ON THE 27TH JUNE, 1872.[1]

Points upon which he desires further argument.

Further argument appears to Her Britannic Majesty's Counsel to be necessary on the following, among other points, as to all which he is prepared to show that the new arguments now advanced by the Counsel of the United States are either wholly erroneous and unwarranted, or calculated to mislead, unless corrected by proper explanations and qualifications.

[The statement then continues, as shown *post*, pages 380 to 384 inclusive, and closes as follows:]

IV.—*As to the particular ships, Florida, Alabama, Georgia, and Shenandoah.*

Her Britannic Majesty's Counsel does not here particularize various new matters now brought forward or suggested in the Argument of the United States as to each of these ships. If those matters should appear to the Arbitrators to be of any importance, it is not doubted that they will ask for and receive the explanations and answers concerning them, which Her Majesty's Counsel will be ready at the proper time to give.

General reasons why further arguments on the above points should be allowed.

1. The character of the documentary evidence presented in the several volumes of the Appendix to the Case of the United States, containing a large mass of miscellaneous papers, or extracts from papers, laid before the Congress of the United States, as to much of which it was necessarily impossible for Her Britannic Majesty's Government to anticipate the use which would be made of them in argument until the present Argument of the United States was presented.

2. The course taken by the Government of the United States in withholding (as far as was possible) their reply as well to the Case as to the Counter Case of Great Britain until the Argument was delivered, so as to make it impossible for the arguments to be at the same time delivered on the part of Her Britannic Majesty's Government, to deal adequately by anticipation with many important views which it was intended by the United States to present to the Tribunal.

3. The new and copious use made in the Argument by the United States of extracts from the works of Sir Robert Phillimore, and from speeches and writings of various British statesmen in Parliament and elsewhere, to many of which no reference had been before made, and some of which are actually now appended as new matter to the Argument itself.

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[1] This application was denied, and the reply which follows was not received by the Tribunal.

II.—REPLY OF THE COUNSEL OF THE UNITED STATES IN RESPONSE TO THE FOREGOING STATEMENT OF SIR ROUNDELL PALMER.[1]

Reasons why further argument should not be ordered at this stage of the proceedings.

The Counsel of the United States desire to submit to the Arbitrators some observations regarding the Memorandum of the Counsel of Great Britain, presented at the conference of the 27th instant, in support of the request of the British Government for leave to file an additional argument on behalf of his Government.

I. The Arbitrators having already refused to grant that request as being incompatible with the first clause of the fifth article of the Treaty of Washington, no occasion remains to discuss the Memorandum in this relation, but it needs to be done in relation to the second clause of the same article of the Treaty.

The stipulation is that subsequently to the filing of written or printed arguments by both parties on the prescribed day, "the Arbitrators may, if they desire further elucidation with regard to any point, require a written or printed statement or argument or oral argument by counsel upon it."

In construction of this clause we respectfully suggest:

1. That under it no question of general argument can arise until after the Arbitrators shall have themselves examined the regular Arguments of the parties, together with the respective Cases and Counter Cases, and come to the conclusion that some particular point or points may require elucidation. But this contingency cannot now have arrived, because the regular and prescribed Argument of the British Government was not filed until the same Conference, and of course there can have been as yet no such examination of the subject as the clause in question supposes.

2. The clause presupposes a *requirement* on the part of the Arbitrators for reason of desire of elucidation on their part. It contemplates a particular state of mind of the Arbitrators, growing out of their examination of the subject-matter, constituting a personal desire, and resulting in a requirement made of their own accord and for their own satisfaction.

Such an occasion may arise, but the Memorandum is wholly inapplicable thereto. The Memorandum does not assume, or pretend to meet, any requirement or any mental desire of the Arbitrators. On the contrary, it expresses only a desire of the Counsel of the British Government to meet alleged exigencies of that Government.

3. The clause of the Treaty contemplates argument, written, printed, or oral, for elucidation with regard to any point. These expressions manifestly imply that, on examination, the Arbitrators encounter some point, some special point, which for their own satisfaction requires further discussion in order to clear up a doubt, supply a *lacuna*, or otherwise afford information.

But the Memorandum proposes a re-argument of the whole case and of all the questions submitted, whether of fact or of law, which at this stage of the Arbitration is wholly incompatible with the clause of the fifth article as already decided, and equally incompatible with the second clause of the fifth article.

[1] The Arbitrators declined to receive this Reply, having denied the request of the British Counsel.

What this Memorandum proposes is still more inadmissible in the last as well as in the first relation, because its professed and special object is to respond to the final Argument of the United States. That the British Government has no right to do, any more than the United States have right to respond to the final British Argument. And above all, in the present relation, such a responsive argument is inadmissible, because it is not elucidation of any particular point, and still less elucidation of any particular obscurity in the minds of the Arbitrators.

What the British Government could not do directly, in the form of new arguments, it cannot do indirectly in the form of an elucidation to be called for by the Arbitrators. Of course the Arbitrators will not of themselves intimate a desire of elucidation which does not exist, in order to enable the Counsel of the British Government to do indirectly what he has no right under the Treaty to do directly.

II. The Memorandum is still more objectionable in a general view of the nature and effect of the Treaty, and what the respective Governments have already done under it.

The Treaty definitely stipulates that the two Governments shall file simultaneously each its Case, its Counter Case, and its Argument. Why this peculiar form of procedure, so different from that in ordinary courts of justice, was adopted, we have no right to know. But we may suppose that it was adopted on a theory of perfect equality and reciprocity.

However this may be, while the arrangement gives to the United States the capability of an opening and a closing discussion in the Case and Counter Case, it gives the same capability to Great Britain.

Finally, it affords to each Government the opportunity to close on the facts as well as law, by means of the Argument, so called, two months after the filing of documentary or other evidence by either Government.

It is impossible to conceive of any arrangement more emphatically *fair* than this with respect to both Governments.

The Case of the United States gave general notice to Great Britain of the claims preferred, while the simultaneous Case of the British Government prevented hasty conclusion on the part of the Arbitrators.

The Counter Case of Great Britain did or might respond in full to the Case of the United States with similar consideration of the rights of the latter in their Counter Case.

Finally, each party had power to argue on the facts and law, but at the same time and on the same plane of right, so as absolutely to preclude all question of separate arguments.

The Memorandum of the Counsel of the British Government seeks to evade all these Treaty arrangements, and to tear down the edifice of perfect reciprocity and equity so carefully constructed by the stipulations of the Treaty, by putting in the very formal responsive argument so carefully prohibited by the Treaty.

Evidently the two Governments did not intend that the Argument of either should be a criticism on that of the other. But that is what the Memorandum proposes to have done. Nay, the Memorandum itself constitutes an inadmissible argumentative criticism on the Argument of the United States.

III. As to the particular ships in question, the Memorandum suggests that the United States have brought forward *new matter* in their Argument. We are not aware of any such matter in our Argument.

The Memorandum further assumes that hereafter, if occasion should arrive, the Arbitrators would ask for explanation in regard to the ships. We do not admit the assumption, and will not argue the question by anticipation.

IV. The Memorandum assigns as further reason for re-argument, that the British Government could not anticipate the use to be made in our Argument of the documentary evidence filed with the American Case. The suggestion is a singular one. We do not understand that when counsel put in evidence, they are required to accompany such evidence with argumentative explanations of why they put it in. The adverse party, versed in the rules of law and the practice of the courts, is to study such evidence and judge for himself of its pertinency or value. If any of the documents thus filed were irrelevant, it was for the British Government to say so in its Counter Case or in its Argument. There was ample time for consideration, namely, in the first relation, four months, and in the second, six.

So, also, during those four or six months, there was ample time for the eminent Counsel of the British Government to study those documents, and perceive, with the practiced eye of forensic experience and science, what use might be made of these documents by the Counsel of the United States, and to anticipate such use by appropriate response or explanation.

But, in fact, we have made no use in our Argument of these documents which was not prefigured, either in the Case or the Counter Case of the American Government.

V. The Memorandum objects that cause of re-argument is furnished by "the course taken by the Government of the United States in withholding (as far as was possible) their reply as well to the Case as to the Counter Case of Great Britain, until the Argument now delivered, so as to make it impossible for the Argument, to be at the same time delivered on the part of Her Britannic Majesty's Government, to deal adequately by anticipation with many important views which it was intended by the United States to present to the Tribunal."

The situation complained of by the Counsel of the British Government was precisely the situation of the Counsel of the United States. We also were bound to anticipate the use that the British Government intended to make of its evidence. We do not feel sure that we fully comprehend this difficulty.

The American Government did reply to the British Case in the American Counter Case. How can this act be fitly characterized as "withholding as far as was possible?"

As to the British Counter Case, how could we reply to it until it had come into our possession? We received it in April, and we replied to it at the earliest possible moment, namely, in June. Is it proper for the Memorandum to apply to this act the phrase of "withholding as far as possible?"

Our Argument was a specific reply to the British Counter Case at the earliest and only possible moment, with but cursory and incidental reference to the British Case, which was for the most part answered in the American Counter Case, with sufficient indication to eminent adverse Counsel of other points of the British Case which would require additional attention in our final Argument.

VI. The Memorandum further complains of the use made in our Argument of the documents annexed to the American Counter Case.

We made only such use of these documents as might well have been anticipated by the British Government, and as their Counsel should have considered in his closing Argument.

The British Case arraigned the conduct of the United States in respect of the manner in which at various epochs of their history they had discharged their neutral obligations.

Does or can the Counsel for the British Government suppose that we should omit to respond to this arraignment by filing defensive proofs as the basis of argument?

Does or can the Counsel of the British Government suppose that we should admit the pertinency of this arraignment, or that we should fail to suggest its inappropriateness?

VII. The Memorandum suggests as a cause for re-argument, that we have referred in our Argument to the great English work of Sir Robert Phillimore on International Law, and to eminent statesmen of Great Britain. We submit that we are wholly unable to see the force of this consideration.

In our argument we quote Phillimore as we quote Wolf, Vattel, Martens, Hautefeuille, Cauchy, Calvo, or Fiore. Why not?

And why should Great Britain object to our citing her most eminent author on the subject of the law of nations? Can it be any surprise to the Counsel of the British Government? Did we not in our Case indicate the use to be made of Sir Robert Phillimore? (Pages 117, 123.)

Then the Memorandum objects to our citing in our Argument the eminent statesmen of Great Britain, living and dead,—the Cannings, the Castlereaghs, the Denmans, the Grants, the Hollands, the Althorps, the Peels, the Huskissons, the Colliers, the Harcourts, the Coleridges, the Redesdales, the Russells, the Granvilles, the Cairns, the Derbys, the Hatherlys, the Salisburys, the Palmers, and the Gladstones.

If it be just cause of offense in the eyes of the Arbitrators that we have referred in honorable terms to these high names of British statesmen, we submit to the censure of the Tribunal, but we deny that the fact affords any reason why the Arbitrators should ask for elucidation on the subject, or that it justifies the application for additional argument on the part of the British Government.

VIII. The Memorandum enumerates under three heads, with subdivisions, the main reasons of the British Government for desiring further argument.

It is remarkable that each one of the points thus suggested has been already argued by the British Government, except one which it purposely omitted, either in its Case, Counter Case, or Arguments. We do not say that all these points have been fully argued by the British Government: that was for their Counsel to judge. But they were argued, and in a much larger *number of words* than appear in the discussions on the side of the United States.

Reduced to the same standard, (that of the page of the British Case,) we have the following state of things:

	Pages.
British Case	168
British Counter Case	154
British Argument and Notes	91
Total pages	413
American Case	128
American Counter Case	11
American Argument	200
Total pages	339

Surely, in view of this comparison, the British Government has no

cause to come forward now and supply deficiencies in its Cases and Argument.

To show that every point on which the British Government now desires to be reheard is discussed in as ample manner (or that it deliberately refused to discuss it at all) as it pleased, with six, four, or two months' time of reflection, and with all the bar of Great Britain at its back, we now proceed to prove by the following tabular statement, the right column of which contains the points which Sir Rundell Palmer desires to argue stated in his own words, and our comments thereon being as in the left-hand column:

I.—AS TO PRINCIPLE.

This doctrine is referred to in all the Cases and Arguments. It is not a new suggestion of principle in our final Argument.	(*a.*) The doctrine of general international obligation asserted more particularly at pages 20 to 23 of the United States Argument.
Considered United States Case, p. 149, *et seq.* British Case, pp. 3, 23, and 24; British Counter Case, pp. 11 to 23; British Argument, pp. 7 and 8.	(*b.*) The view submitted in the United States Argument (pages 146 to 147 and elsewhere) of the effect in the present controversy of Her Majesty's consent that the three Rules embodied in the sixth article of the Treaty of Washington may be applied by the Tribunal as rules of judgment to the facts of the present case.
Considered United States Case, pp. 150 to 158; United States Counter Case, p. 6. British Case, p. 24; British Counter Case, pp. 21 and 22; British Argument, p. 8.	(*c.*) The doctrines as to due diligence and as to the practical consequences of the obligation of such diligence, and of the omission in any case to use it, advanced more particularly at pages 154 to 162, 148 to 149, and 186 of the United States Argument.
Considered United States Case, pp. 106, 118 to 122; United States Counter Case, pp. 6 and 7. British Counter Case, p. 5; British Argument, p. 9, *et seq.* See also Annex "C," British Counter Case. In this paragraph of the Memorandum our Argument is erroneously stated. We say that the Queen's prerogative is a part of the common law of England. We deny that the British Foreign-Enlistment Act was the only law of Great Britain. If so, it should have been amended.	(*d.*) The doctrines that a sovereign power, in repressing acts contrary to its neutrality, ought to act by prerogative and not by law, and that any reference to the internal laws of a neutral State ought to be rejected as irrelevant to the question whether that State has used due diligence in the performance of its international obligations. (Pages 20, 24 to 26, 27, 149 to 152, and 165 of the United States Argument.)
Considered United States Case, pp. 63 and 64; United States Counter Case, p. 7. British Case, pp. 4 to 7; British Argument, p. 30.	(*e.*) The doctrines as to belligerency and neutrality in cases of civil war set forth particularly at pages 7 to 13, 19, and 27 of the United States Argument, and the conclusion thence drawn as to the

recognition of the belligerency of the Confederates by Her Britannic Majesty and the effect of Her Britannic Majesty's Proclamation of Neutrality and the bearing of these matters upon the present controversy, notwithstanding the admission, at page 209, that such recognition of the belligerency of the Confederates is excluded by the terms of the Treaty of Washington from being admissible as a specific ground of claim before the Tribunal.

Considered United States Counter Case, p. 6. British Case, p. 24; British Counter Case, pp. 15 to 20; British Argument, pp. 29 to 33.

(*f.*) The doctrines that the public ships of war of a non-sovereign belligerent are liable to neutral jurisdiction or control in cases in which the public ships of a sovereign belligerent would not be so liable, and that it was part of the duty of Her Britannic Majesty's Government toward the United States, either by virtue of the first rule in the sixth article of the Treaty of Washington, or otherwise, to detain certain of the Confederate vessels, being public ships of war of a "non-sovereign belligerency," when found within British ports, or (in the alternative) to exclude them from all access to those ports. (See pages 152 to 153, 175 to 178, and 182 of the United States Argument.)

Considered United States Case, pp. 126, 351, 352, 459 and 460. British Counter Case, p. 15; British Argument, pp. 33 and 34.

(*g.*) The application attempted to be made in several parts of the United States Argument of phrases, "base of naval operations" and "augmentation of force," used in the second Rule, and particularly the doctrine (see pages 130 to 132, and 139) that to allow belligerent cruisers navigated by steam-power to receive supplies of coal or "repairs which may make their steam-power effective" in neutral ports, is a breach of that Rule or of any other neutral obligation.

Considered United States Case, p. 459. British Counter Case, pp. 60–62; British Argument, p. 25–28.

(*h.*) The doctrine that the character of acts or omissions on the part of a neutral power, which would otherwise be consistent with the due performance of neutral obligations, is altered by the circumstance that a belligerent has agents

and agencies within the neutral territory, and has direct dealings there with neutral citizens.

Considered United States Case, pp. 109, 212, 467–481; United States Counter Case, Part IX. British Case, p. 167; British Counter Case, pp. 130–142; Notes in vol. 7 of British Appendix; British Argument, pp. 35–37; Annexes C and D to British Argument.

(*i.*) The argument of the United States as to the liability of Great Britain to make pecuniary compensation to the United States if she is found in any respect to have failed in the performance of her neutral obligations, and as to the measure of damages, and the principle applicable thereto.

II.—AS TO FACTS GENERALLY.

Considered United States Case, pp. 109, 110; United States Counter Case, p. 16. British Case, p. 24; British Counter-Case, p. 7; British Argument, pp. 9–11. See also Annex B to British Counter Case.

(*j.*) The argument of the United States that the British Foreign-Enlistment Act of 1819 contained no provisions of a preventive efficacy, but was merely of a punitive character.

Considered United States Case, p. 112; United States Counter Case, p. 16. British Case, p. 25; British Counter Case, p. 7; British Argument, pp. 9, 11. See also Annex B to British Counter Case.

(*k.*) The argumentative comparison between the British Foreign-Enlistment Act and the Foreign-Enlistment Act and Executive powers of the United States and those of other countries, intended to show the inferior efficacy of the British statute.

Considered United States Counter Case, pp. 6, 20. British Case, p. 57; British Argument, p. 9. See also Annex C, British Counter Case.

(*l.*) The suggestion of the existence of prerogative powers in the Crown of Great Britain, and of powers under the British customs and navigation laws, which ought to have been, but were not, used for the maintenance of Her Britannic Majesty's neutrality.

We cite Sir R. Phillimore and Lord Russell, Sir Roundell Palmer, and Sir Alexander Cockburn, and Mr. Canning, as Great Britain may and do cite Wheaton, Story, Jefferson, or Washington. Why not?—we say a second time. We find good matter, excellent matter, in these documents.

(*m.*) The alleged admissions of various British writers and statesmen in printed books, parliamentary speeches, and otherwise, of principles or facts, assumed to be in accordance with the present Argument of the United States.

Considered United States Case, pp. 462–466; United States Counter Case, p. 11. British Counter Case, pp. 119–123; British Argument, p. 34.

(*n.*) The alleged differences between the conduct of France and other countries, and the conduct of Great Britain in the observance of neutrality during the war.

III.—AS TO ERRONEOUS VIEWS OF BRITISH ARGUMENTS, ETC.

Considered United States Case,

(*o.*) The assertion that Great

pp. 250–256 ; United States Counter Case, p. 7. British Case, p. 24.

Britain has made her own municipal legislation the measure of her international obligations, and has pleaded any supposed inefficiency of her laws as an excuse for the non-performance of such obligations, which she has never done.

Considered United States Case, pp. 113–116. British Counter Case, pp. 8, 9.

(*p.*) The inference that because Great Britain has thought it right to legislate, since the war, so as to enlarge the legal control of her Government over certain classes of transactions by her citizens, calculated to lead to difficulty with foreign Powers, she has thereby or otherwise admitted the insufficiency of her laws, during the civil war, for the performance of her neutral obligations.

We do not understand that, because the British Government refused to discuss this point in its Counter Case, we are, therefore, deprived of the right to discuss it. Besides, why seek for re-argument on a point which she refused to discuss?

(*q.*) The manner in which it has been thought fit, in the Argument of the United States, to treat the refusal of Great Britain in her Counter Case to enter into any detailed justification of her Government against the imputation of insincere neutrality, and unfriendly motives toward the United States, as a virtual admission of such insincere neutrality and such unfriendly motives.

Considered United States Counter Case, pp. 13–16. British Case, pp. 25–29; British Counter Case, pp. 25–47; British Argument, pp. 8, 9.

(*r.*) The erroneous representation in the same argument, of the purpose for which numerous historical instances of the extension and persistent violation of the neutral or friendly obligations of the United States toward other powers, by citizens of the United States acting contrary to their laws, have been referred to in the Counter Case of Her Britannic Majesty's Government, and the attempt to escape from the direct bearing of those instances upon the question, whether the views of the preventive power which a belligerent has a right to exact from a neutral State, and of the measure of the due diligence with which it is incumbent upon a neutral State to use its preventive powers, insisted upon by the United States in the present controversy against Great Britain, are historically well founded, or politically possible or

consistent with the practice and experience of the United States themselves, who have appealed in their own Case and Counter Case, and in the Appendix to their Counter Case, to most of the very same transactions (which Great Britain is now alleged to have improperly brought forward) as actually furnishing evidence of the efficacy of their laws, and of the diligence and good faith with which those laws have been executed.

IX. In conclusion, we respectfully submit to the Arbitrators that the sense of the treaty is plain, and that it imperatively forbids any such action, direct or indirect, as is proposed in the Memorandum.

In preparing their arguments the Counsel on both sides considered the question, and without mutual conference they both came to the same conclusion, and expressed it in substantially the same spirit, with difference of language only. In the expression of courteous deference to the Arbitrators, we beg the Tribunal on this point to look at page 1 of the British, and page 6 of the American Argument.

We have not discussed here the argumentative points of the Memorandum, as we might well have done, considering all such discussion inappropriate at this time.

Finally, we need say little on the question of convenience; but we cannot forbear to say that as to the Arbitrators, as we may well suppose, but certainly for ourselves, for whom alone we have a right to speak, prolonged debate involves cares, and inconvéniences of separation from home and from our personal and professional affairs, which do not apply to the Counsel of the British Government.

In this view and in other relations, we respectfully suggest that the Arbitrators, if they need elucidation of any point, should propose specifically such point and require Counsel to argue *viva voce*, face to face, in the presence of the Tribunal.

C. CUSHING.
WM. M. EVARTS.
M. R. WAITE.

III.—ARGUMENT OF SIR ROUNDELL PALMER ON THE QUESTIONS OF "DUE DILIGENCE," THE "EFFECT OF COMMISSIONS UPON THE INSURGENT CRUISERS," AND THE SUPPLIES OF COAL TO SUCH CRUISERS IN BRITISH PORTS."

[Filed July 29.—See Protocol xv.]

CHAPTER I.—ON THE QUESTION OF "DUE DILIGENCE" GENERALLY CONSIDERED.

When the inquiry is, whether default has been made in the fulfillment of a particular obligation, either by a state or by an individual, it is first necessary to have an accurate view of the ground, nature, and extent of the obligation itself. 1. On the sources of the obligation.

The examination of this question will be simplified by considering in the first instance, such a case as that of the Alabama, at the time of her departure from Great Britain, namely, a vessel built and made ready for sea, with special adaptation for warlike use, by British shipbuilders in the course of their trade, within British territory, to the order of an agent of the Confederate States, but not armed, nor capable of offense or defense at the time of her departure.

Any obligation which Great Britain may have been under toward the United States, in respect of such a vessel, could only be founded, at the time when the transaction took place, (1) upon some known rule or principle of international law; or (2) upon some express or implied engagement on the part of Great Britain.

The three rules contained in the VIth Article of the treaty of Washington become elements in this inquiry solely by virtue of the declaration made in that article, that—

> Her Majesty's government cannot assent to the foregoing rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article I arose; but that Her Majesty's government * * * agree that, in deciding the questions between the two countries arising out of those claims, the arbitrators should assume that Her Majesty's government had undertaken to act upon the principles set forth in those rules.

In order rightly to understand the effect of the agreement embodied in this declaration, it is important to see how the question between the two governments would have stood without it.

I.—*As to the rules and principles of international law.*

These must be obtained from the authorities which show what had previously been received and understood among nations as to the obligations of neutral states toward belligerents; remembering always, that what is called international law (in the absence of particular compacts between states) is imposed only by the moral power of the general opinion and practice of civilized nations; that, (in the words of Lord Stowell, quoted with approval by the great American jurist, Wheaton, "Histoire des Progrès du Droit des Gens," vol. i, p. 134,) "une grande partie du droit des gens est basée sur l'usage et les pratiques des nations. Nul doute qu'il a été introduit 2. Source I. Rules and principles of international law.

par des principes généraux, (du droit naturel;) mais il ne marche avec ces principes que jusqu'à un certain point; et s'il s'arrête à ce point nous ne pouvons pas prétendre aller plus loin, et dire que la seule théorie générale pourra nous soutenir dans un progrès ultérieur."

In a case in which no active interference in war is imputed to a neutral state, international law knows nothing of any obligation of that state toward a belligerent, as such, except to preserve its neutrality. To constitute a merely passive breach of neutrality on the part of such a state, some act must have been done by, or in aid of, a belligerent, for the purposes of the war, which, unless done by the permission of the neutral state, would be a violation of its territory, or of its sovereignty or independence within that territory, and such act must have been expressly or tacitly permitted on the part of the neutral government. For acts done beyond the neutral jurisdiction by subjects of the neutral power, to the injury of a belligerent, the law of nations has appropriate remedies; but those acts, involving no violation or hostile use of neutral territory, are not imputed as breaches of neutrality to the neutral state. And for a violation or hostile use of neutral territory without the permission or intentional acquiescence of the neutral state, reparation may be due from the offending belligerent to the injured neutral, but the neutral so injured has been guilty of no breach of any neutral obligation toward the other belligerent, whether he does, or does not, subsequently obtain reparation from the offender.

Between the commercial dealings of neutral citizens, in whatever kinds of merchandise, (and whether with the citizens or with the governments of belligerent states,) and the levying or augmentation of military or naval forces, or the fitting out and dispatch of military or naval expeditions by a belligerent within neutral territory, international law has always drawn a clear distinction. The former kind of dealings, if they are permitted by the local law of the neutral state, involve on the part of that state no breach of neutrality; if they are prohibited, a disregard of the prohibition is not a violation or hostile use of the neutral territory, but is an illegal act, the measure of which, and the remedies for which, must be sought for in the municipal and not in international law. The other class of acts cannot be done against the will of the neutral sovereign without a violation of his territory, or of his sovereignty and independence within that territory; and to permit this, for the purposes of the war, would be a breach of neutrality.

The continuance during the war, within the neutral territory, of trade by neutral citizens with both or either belligerent, in the produce or manufactures of the neutral state, whether of those kinds which (when carried by sea to a belligerent) are denominated contraband of war, or of any other description, has always been permitted by international law, and no authority, anterior to the departure of the Alabama from Great Britain, can be cited for the proposition that unarmed ships of war, constructed and sold by neutral ship-builders in the course of their trade, were, in the view of international law, less lawful subjects of neutral commerce with a belligerent than any other munitions or instruments of war.

The authorities on this subject are quoted at large in Annex (A) to the British Counter Case. Galiani, one of these authorities, argued that the sale in a neutral port, to a belligerent, of a ship not only built but *armed* for war, ought to be deemed prohibited; but Lampredi, Azuni, and Wheaton rejected that opinion, and held that (the transaction being a commercial one on the part of the neutral seller) the addition even of an armament would make no difference. Story took the same view of

the dispatch by a neutral citizen of a ship of war fully armed from the neutral territory to a belligerent port, with a view to her sale there to a belligerent power.[1] Mr. Adams himself, in his official correspondence with Earl Russell, (April 6, 1863,[2]) admitted the soundness of these doctrines, assuming the transaction of sale and transfer by the neutral to be "purely commercial;" and also assuming the belligerent country, to which such vessels of war might be sold and transferred, to be "not subject to blockade." It cannot, however, be seriously imagined that the existence of a blockade of the ports of the belligerent purchaser would make such a transaction, if it would otherwise be lawful, a violation of the neutrality of a neutral state, in the view of international law.

It may be true that, when an armed ship of war is sold to a belligerent within neutral territory and goes to sea from thence fully capable of offense and defense under the control of the belligerent purchaser, there would often, (perhaps generally,) exist grounds for contending that the transaction was not substantially distinguishable from the dispatch of a naval expedition by the belligerent from the neutral territory; and this was doubtless a cogent reason for the special legislation of the United States and of Great Britain, which, (whatever further scope it may have had,) was undoubtedly intended to prevent such expeditions, by striking at the armament of ships of war within neutral territory, for the service of a belligerent. But the case of a ship leaving the neutral country unarmed is, in this respect, wholly different. Her departure is no operation of war; she is guilty of no violation of neutral territory; she is not capable, as yet, of any hostile act. The words of Mr. Huskisson in the debate on the Terceira expedition in the British Parliament, (Huskisson's Speeches, vol. iii, p. 559,) and of Mr. Canning, as there quoted by him, are strictly applicable to such a case, and deserve reference as showing the view of this subject taken long ago by those eminent British statesmen. Speaking of certain complaints made by Turkey during the Greek revolutionary war, he said:

> To these complaints we constantly replied: "We will preserve our neutrality within our dominions, but we will go no further. Turkey did not understand our explanation, and thought we might summarily dispose of Lord Cochrane, and those other subjects of Her Majesty who were assisting the Greeks." To its remonstrance Mr. Canning replied: "Arms may leave this country as matter of merchandise; and however strong the general inconvenience, the law does not interfere to stop them. It is only when the elements of armaments are combined that they come within the purview of the law; and, if that combination does not take place until they have left this country, we have no right to interfere with them." Those were the words of Mr. Canning, who extended the doctrine to steam vessels and yachts, that might afterward be converted into vessels of war, and they appear quite consistent with the acknowledged law of nations.

II.—*As to an express or implied engagement of Great Britain.*

3. Source II. Express or implied engagements of Great Britain.

Great Britain had no treaty or convention with the United States as to any of these matters, but she had, in 1819, for the protection of her own peace and security, and to enable her the better to preserve her neutrality in cases of war between other countries, enacted a municipal law prohibiting, under penalties, (among

[1] Sir R. Phillimore, in vol. iii of his work, (published in 1857,) rejects the distinction of these writers between the export of contraband and the sale of the same kinds of articles within the neutral territory. But he does not, of course, maintain that it is part of the international duty of a neutral state to prohibit or prevent dealings in contraband articles by its subjects in either of these ways.

[2] Appendix to Case of United States, vol. i, p. 592.

other things,) "the equipment, furnishing, fitting out, or arming of any ship or vessel within British jurisdiction, with intent or in order that such ship or vessel should be employed in the service of any foreign Prince," (or other bellig erent,) "with intent to cruise or commit hostilities against any Prince, state, or potentate," &c., with whom Great Britain might be at peace. Every attempt or endeavor to do, or to aid in doing, any of these prohibited acts was also forbidden; every ship or vessel which might be equipped, or attempted to be equipped, &c., contrary to these prohibitions, was declared forfeited to the Crown, and the officers of Her Majesty's customs were authorized to seize and to prosecute to condemnation in the British court of exchequer every ship or vessel with respect to which any such act should be done or attempted within British jurisdiction. This law (which was called the Foreign-Enlistment Act) was regarded by Her Britannic Majesty's advisers, not only as prohibiting all such expeditions and armaments, augmentation of the force of armaments, and recruitments of men, as, according to the general laws of nations, would be contrary to the duties of a neutral State, but also as forbidding the fitting out or equipping, or the special adaptation, either in whole or in part, to warlike use, within British jurisdiction, of any vessel intended to carry on war against a Power with which Great Britain might be at peace, although such vessel might not receive, or be intended to receive, any armament within British jurisdiction; and although she might be built and sold by ship-builders in the ordinary course of their trade to the order of a belligerent purchaser, so as not to offend against any known rule of international law.

4. Effect of prohibitory municipal laws.

It has never been disputed by Her Majesty's Government that when, at the time of the breaking out of a war, prohibitions of this kind, exceeding the general obligations of international law, exist in the municipal law of a neutral nation, a belligerent, who accepts them as binding upon himself and renders obedience to them, has a right to expect that they will be treated by the neutral Government as equally binding upon his adversary, and enforced against that adversary with impartial good faith, according to the principles and methods of the municipal law, of which they form part. Obligations which are incumbent upon neutral nations by the universal principles of international law stand upon a much higher ground; as to them, a belligerent has a right to expect that the local law should make proper provision for their performance; and, if it fails to do so, the local law cannot be pleaded as constituting the measure or limit of his right. But a right created by the municipal law of a neutral State must receive its measure and limit as much with respect to any foreign belligerent Power as with respect to the citizens of the neutral State itself, from the municipal law which created it. Any engagement of the neutral toward a belligerent State, which may be implied from the existence of such a law, can go no further than this. And if to this is superadded an express promise or undertaking to apply the law in good faith to all cases, to which there is reasonable ground for believing it to be applicable, that promise and undertaking leaves the nature of the obligation the same; it does not transfer the prohibition or the right of the belligerent with respect to the manner of enforcing it from the region of municipal to that of international law.

Accordingly, the Minister of the United States, during the civil war, constantly applied to Her Majesty's Government to put this municipal law of Great Britain in force. To select two out of a multitude of instances: On the 9th of October, 1862, (soon after the departure of the Alabama,) Mr. Adams sent to Earl Russell an intercepted letter from

the Confederate Secretary of the Navy, in which the Florida was referred to "as substantiating the allegations made of infringement of the Enlistment Law by the insurgents of the United States in the ports of Great Britain;" and added:

> I am well aware of the fact to which your Lordship calls my attention in the note of the 4th instant, * * * that Her Majesty's Government are unable to go beyond the law, municipal and international in preventing enterprises of the kind referred to. But in the representations which I have had the honor lately to make. I beg to remind your Lordship that I base them upon evidence which applies directly to infringements of the municipal law itself, and not to anything beyond it.[1]

And on the 29th of September, 1863, writing with respect to the iron-clad rams at Birkenhead, he said:

> So far from intimating hostile proceedings toward Great Britain unless the law, which I consider insufficient, is altered, [quoting words from a letter of Earl Russell,] the burden of my argument was to urge a reliance upon the law as sufficient, as well from the past experience of the United States, as from the confidence expressed in it by the most eminent authority in this kingdom.[2]

In answer to all these applications, Her Majesty's Government uniformly undertook to use their best endeavors to enforce this law, and to do so (notwithstanding a diversity of opinion, even upon the judicial Bench of Great Britain, as to its interpretation) in the comprehensive sense in which they themselves understood it, not only by penal but by preventive measures, (*i. e.*, by the seizure of any offending vessels before their departure from Great Britain,) upon being furnished with such evidence as would constitute, in the view of British law, reasonable ground for believing that any of the prohibited acts had been committed or were being attempted.

When, therefore, Her Majesty's Government, by the sixth article of the Treaty of Washington, agreed that the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in the three Rules, (though declining to assent to them as a statement of principles of international law, which were in force at the time when the claims arose,) the effect of that agreement was not to make it the duty of the Arbitrators to judge retrospectively of the conduct of Her Majesty's Government according to any false hypothesis of law or of fact, but to acknowledge, as a rule of judgment for the purposes of the Treaty, the undertaking which the British Government had actually and repeatedly given to the Government of the United States, to act upon the construction which they themselves placed upon the prohibitions of their own municipal law, according to which it was coincident, in substance, with those Rules.

5. The three Rules of the Treaty of Washington.

With respect to these three Rules, it is important to observe that not one of them purports to represent it as the duty of a neutral Government to prevent, under all circumstances whatever, the acts against which they are directed. The first and third Rules recognize an obligation (to be applied retrospectively upon the footing, not of an antecedent international duty, but of a voluntary undertaking by the British Government) "*to use*" within the neutral jurisdiction "*due diligence to prevent*" the acts therein mentioned; while the second recognizes a like obligation "*not to permit or suffer*" a belligerent to do certain acts; words which imply active consent or conscious acquiescence.

III.—*Principles of Law relative to the diligence due by one State to another.*

The obligation of "due diligence," which is here spoken of, assumes

[1] Brit. App., vol. i, p. 216.

[2] Ibid., vol. ii, p. 378.

6. General principles for finding what diligence is due.

under the first Rule expressly, and under the third by necessary implication, the existence of a "reasonable ground of belief;" and both these expressions, "due diligence" and "reasonable ground of belief," must be understood, in every case, with respect to the nature of the thing to be prevented, and the means of prevention with which the neutral Government is or ought to be provided. When the obligation itself rests not upon general international law, but upon the undertaking of a neutral Government to enforce in good faith the provisions of its own legislation, the measure of due diligence must necessarily be derived from the rules and principles of that legislation. When the obligation rests upon the more general ground of international law, inasmuch as it is requisite in the nature of things that every obligation of a Government, of whatever kind, must be performed by the use of the lawful powers of that Government within the sphere of its proper authority, it will be sufficient if the laws of the neutral State have made such proper and reasonable provision for its fulfillment as is ordinarily practicable, and as, under the conditions proper for calling the obligation into activity, may reasonably be expected to be adequate for that purpose; and if upon the occurrence of the emergency recourse is had, at the proper time and in the proper manner, to the means of prevention provided by such laws.

Nothing could be more entirely abhorrent to the nature or more inconsistent with the foundations of what is called international law than to strain it to the exaction from neutral Governments of things which are naturally or politically impossible, or to the violation of the principles on which all national Governments (the idea of which necessarily precedes that of international obligation) themselves are founded.

7. The maxims cited by the United States from Sir R. Phillimore, on the question, "*Civitasne deliquerit, an cives?*"

It will be convenient, in this place, to examine the meaning of certain propositions extracted in the Argument of the United States from Sir Robert Phillimore's work on international law, which were certainly not intended by that jurist to be understood in the absolute and unqualified sense in which the Counsel of the United States seem desirous of using them. It is proper here to mention that Sir Robert Phillimore, the author of that work, wasappointed Her Britannic Majesty's Advocate, in the room of Sir John Harding, in August, 1862; and that with respect to all the questions which afterward arose between the British Government and the United States, till some years later than the termination of the war, the British Government acted under his advice, which must be presumed to have been in accordance with his view of international obligations. That period covers the ground of all the claims now made by the United States against Great Britain, except those which relate to the Sumter and the Nashville, and to the original departure of the Florida and the Alabama from Great Britain.

The following extract (United States Argument, page 20) is from the Preface to the second edition of the first volume of Sir R. Phillimore's work, (pp. 20–22:)

> There remains one question of the greatest importance, namely, the *responsibility of a state* for the acts of her citizens, involving the duty of a neutral to prevent armaments and ships of war issuing from her shores for the service of a belligerent, though such armaments were furnished and ships were equipped, built, and sent without the knowledge and contrary to the orders of her Government.
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> The question, to what extent the State is responsible for the private acts of its subjects, (*civitasne deliquerit, an cives?*) is one of the most important and interesting parts of the law which governs the relations of independent States.
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> It is a maxim of general law that, so far as foreign States are concerned, the will of the subject must be considered as bound up in that of his Sovereign.

It is also a maxim that each State has a right to expect from another the observance of international obligations, without regard to what may be the municipal means which it possesses for enforcing this observance.

The act of an individual citizen, or of a small number of citizens, is not to be imputed without clear proof to the Government of which they are subjects.

A Government may by *knowledge* and *sufferance*, as well as by direct *permission*, become responsible for the acts of subjects whom it does not prevent from the commission of any injury to a foreign State.

A Government is presumed to be able to restrain the subject within its territory from contravening the obligations of neutrality to which the State is bound.

Upon this passage, which couples together "armaments and ships of war," it is to be observed, in the first place, that there is nothing in it which implies any different view of the extent of those international obligations (as distinct from its own municipal prohibitions) by which a State is bound, from that which is shown to have been established by earlier authorities. Sir R. Phillimore is too sound a jurist to suppose that any private opinion of a particular jurist could impose retrospectively upon the Governments of the civilized world obligations not previously recognized. He does not define here what are "the obligations of neutrality by which the State is bound;" he leaves them to be ascertained from the proper sources of information.

Next, when he lays it down as a maxim, that "each State has a right to expect from another the observance of international obligations, without regard to what may be the municipal means which it possesses for enforcing this observance," he says nothing at all inconsistent with the proposition, that a neutral State will have observed its international obligations with due diligence, if, having provided itself with municipal means suitable to the nature and character of those obligations, it proceeds to use those means in good faith, on the proper occasions, and in the proper manner, though (it may be) without succeeding in the prevention of everything which it is bound to endeavor to prevent. The learned author's meaning, and the kind of cases which he has in view, are apparent from the reference which he makes in the foot-note to Part IV, ch. i, of the same volume, where he discusses the doctrine of "intervention" in the following terms:

CCCXCII. And first of all, it should be clearly understood that *the intervention of bodies of men, armed or to be armed*, uncommissioned and unauthorized by the State to which they belong, *in a war*, domestic or foreign, of another State, has no warrant from international law. It has been already observed (Section CCXIX) that it is the duty of a State to restrain its subjects from *invading the territory* of another State; and the question, when *such an act* on the part of subjects, though unauthorized by the State, may bring penal consequences upon it, has received some consideration. It is a question to which the events of modern times have given great importance, and as to which, during the last half-century, the opinions of statesmen, especially of this country (Great Britain) have undergone a material change. That this duty of restraining her subjects is incumbent upon a State, and that her inability to execute it cannot be alleged as a valid excuse, or as a sufficient defense to *the invaded State*, are propositions which, strenously contested as they were in 1818, will scarcely be controverted in 1870. The means which each State has provided for the purpose of enabling herself to fulfill this obligation form an interesting part of public and constitutional jurisprudence, to the province of which they, strictly speaking, belong. This question, however, borders closely upon the general province of international law, and upon the particular theme of this chapter.

The proposition that "a Government is presumed to be able to restrain the subject within its territory from contravening the obligations of neutrality, to which the State is bound," is properly qualified, in the immediately preceding context, by the statement that "the act of an individual citizen, or of a small number of citizens, is not to be imputed without clear proof to the Government of which they are subjects, and that either "*knowledge and sufferance*," or "direct permission," is neces-

sary to make a Government responsible for the acts of subjects "whom it does not prevent from the commission of injury to a foreign State."

Another passage, bearing upon this latter point, is also cited in the American Argument, from volume iii, p. 218, of the same work:

In fact, the maxim adverted to in a former volume of this work is sound, viz: that a State is *prima facie* responsible for whatever is done within its jurisdiction; for it must be *presumed* to be capable of preventing or punishing offenses committed within its boundaries. A body politic is therefore responsible for the acts of individuals, which are *acts of actual or meditated hostility* toward a nation with which the Government of these subjects professes to maintain relations of friendship or neutrality.

The passage in a former volume here referred to is in the chapter on "Self-Preservation," vol. i, part 3, chap. x. This, as well as all the other passages relied on by the United States, has reference to the *organization of hostile expeditions* against a foreign Power in a neutral or friendly territory. "If" (says the learned author) "the hostile expedition of the present" (or late) "Emperor of the French in 1842 against the existing monarchy of France had taken place *with the sanction or connivance of the English Government*, England would have been guilty of a very gross violation of international law;" and, after some intervening remarks applicable to "*all cases where the territory of one nation is invaded from the country of another*," he refers to "a very important chapter, both in Grotius and in his commentator Heineccius, entitled '*De Pœnarum Communicatione*,' as to when the guilt of a malefactor, and its consequent punishment, is communicated to others than himself."

"The question," he proceeds, "is particularly considered with reference to the responsibility of a State for the conduct of its citizens. The tests for discovering '*civitasne deliquerit an cives*' are laid down with great precision and unanimity of sentiment by all publicists, and are generally reduced to two, as will be seen from the following extract from Burlamaqui, who repeats the opinion of Grotius and Heineccius." "In civil societies (he says), when a particular member has done an injury to a stranger, the Governor of the Commonwealth is sometimes responsible for it, so that war may be declared against him on that account. But to ground this kind of imputation, we must necessarily suppose one of these two things, sufferance or reception, viz: either that the Sovereign has suffered this harm to be done to the stranger, or that he afforded a retreat to the criminal. In the former case it must be laid down as a maxim that a Sovereign who, knowing the crimes of his subjects—as, for example, that they *practice piracy* on strangers—and being also able and obliged to hinder it, does not hinder it, renders himself criminal, because he has permitted, and consequently furnished a just reason of war. *The two conditions above mentioned—I mean the knowledge and sufferance of the Sovereign—are absolutely necessary*, the one not being sufficient without the other to communicate any share in the guilt. Now, it is presumed that a Sovereign knows what his subjects openly and frequently commit; and as to his power of hindering the evil this likewise is always presumed, unless the want of it be clearly proved."

"So Vattel: 'Si un souverain, qui pourrait retenir ses sujets dans les règles de la justice et de la paix, souffre qu'ils maltraitent une nation, ou dans son corps ou dans ses membres, il ne fait pas moins de tort à toute la nation que s'il la maltraitait lui-même.'

"The act of an individual citizen, or of a small number of citizens, is not to be imputed, without special proof, to the nation or Government of which they are subjects. A different rule would of course apply to the acts of large numbers of persons, especially if they appeared in the array and with the weapons of a military force, as in the case of the invasion of Portugal, which has been referred to above."

To the principles of these extracts, relating as they do only to hostile expeditions or the invasion of territory or other operations of war, organized and carried on in a neutral country against a belligerent State, with the knowledge and sufferance of the neutral Government, no just exception can be taken. But they do not assert, and they have no tendency to prove, that the construction and sale of an unarmed ship of war by neutral ship-builders to a belligerent within neutral territory is, in the view of international law, a "hostile expedition." Upon the question of the due diligence required from a neutral Government for

the prevention of those things which (when the requisite knowledge of them exists) it is bound to endeavor to prevent, and for which it will become responsible if it "knows and suffers" them, they throw no light beyond this: That a neutral Government is presumed, in general, to have the means of performing its international obligations; that it may also be presumed to know (and to suffer, if it does not interfere with them) hostile acts of an unequivocal character done within its territory by large numbers of persons without disguise or concealment; and, on the other hand, that it is not presumed to have the means of preventing, and is therefore not held responsible for suffering those things (though done by its citizens to the injury of a friendly State) of which it cannot be presumed or proved to have had knowledge; and that the knowledge or sufferance of such acts on the part of individual citizens, or of small numbers of citizens, is not to be imputed to their Government without positive proof of such knowledge and sufferance, in each particular case, as a matter of fact.

These are among the elementary principles on which, in the present controversy, the British Government relies. Nothing can be further from the truth than that the British Government has ever (as is repeatedly, and in a manner not free from offense, imputed to it in the Argument of the United States) "defended itself against charges of wrong by setting up a plea of incapacity to discharge the duties of a sovereign State." It has always maintained, and it still maintains, that it has justly and adequately discharged all those duties. Wherever, in this controversy, it has referred to the limitations upon its own power, imposed by the laws of Great Britain, from which its existence and its authority are derived, it has done so in strict accordance with the principles of international equity and justice. Those principles, being founded on the laws of nature and reason and the received usages of nations, cannot contemplate the performance of international obligations by national Governments as against their own citizens and within their own territory, except by means of just and reasonable general laws made for that purpose, and by the proper use of the legal means so provided.

8. For what purposes Great Britain refers to her municipal law.

Those principles also recognize the absolute right and duty of every national Government, which has extended the prohibitions of its own municipal law to things which it was not, by international law, antecedently bound to prohibit, to act upon those municipal laws, as constituting, with respect to such matters, the just and the only measure, as well of the right of a foreign nation seeking to have the benefit of them, as of its own powers of prevention.

The passage in Tetens's work ("Considérations des Droits Réciproques des Puissances Belligérantes et des Puissances Neutres sur Mer") cited from M. Reddie's English, in the note at page 23 of the British Counter Case, is irrefragably sound and just:

9. Doctrine of Tetens as to municipal laws, in excess of antecedent international obligations.

> It is a wise foresight for neutral Governments to obviate, during war, as far as possible, all illegal conduct on the part of their subjects, for the double advantage of preserving them from risks, and of preventing the suspicions of belligerents against the traders who sail under neutral flags.
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> What neutrals, however, may do in this respect does not arise from any right which imposes on them the obligation of maintaining a more special surveillance over their subjects during war than they are in the habit of doing during peace, nor to exercise a more extensive inspection over the legality of their conduct toward belligerents than that which is prescribed by law.
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> From neutral Governments not being under an obligation to obviate the abuses of their subjects, it follows that belligerents, whatever condescension they may have to

expect from them for that purpose, cannot reasonably require them to extend their measures beyond what is in practice in these same neutral countries for preventing frauds being committed on their own Customs, and for checking the other deceitful contrivances for evading payment of the revenues of the State. The maximum of precaution, in this case, is to maintain and enforce the observance of neutrality in vessels and cargoes with the same diligence and exactness as are exercised in inquiries and other proceedings relative to taxes or imposts and Customs. He who does as much to prevent a wrong meditated against another as he does for his own protection, satisfies every just and reasonable expectation on the part of that other. Perhaps, however, more might be done, if it were wished, completely to attain the object. In time of war special instructions might be ordered; tribunals of inquiry might be established against the frauds of merchants and ship-owners, and more rigor might be shown in the punishment of their delinquencies. But this cannot be demanded on the one side; and, on the other, it might be difficult to grant it, because there might result from it consequences inconsistent with the general spirit of the prohibitory laws of the State. At least, this care must be left to the neutral Governments, to whom alone it belongs to judge what it may be proper for them to do with reference to the circumstances of the war.

10. Influence upon the question of diligence of the different forms of national Governments.

Furthermore, in considering any question of "due diligence" on the part of a national Government, in the discharge of any of its duties, it is unavoidably necessary, upon those general principles of reason, and of the practice of nations, which are the foundations of international law, to have regard to the diversity in the forms and Constitutions of different Governments, and to the variety of the means of operation, for the performance of their public duties, resulting from those various forms and Constitutions. Thus, it is stated, at page 49 of the Argument of the United States, that "in the United States it was necessary to impart such executive powers" (as were given by the Acts of Congress of 1794, 1817, and 1818) "to the President; because, according to the tenor of our Constitution, it does not belong to the President to declare war, nor has he complete and final jurisdiction of foreign affairs. In all that he must act with the concurrence, as the case may be, of Congress or of the Senate." If the President has no executive power in the United States, except what is conferred upon him expressly by the law of that country, it is equally certain that the Sovereign of Great Britain, and the various Ministers of State and other officers by whom the executive Government in Great Britain is carried on under her authority, have also no executive power except what is conferred upon them by British law; and that (assuming the laws of both those countries to make just and reasonable provision for the fulfillment, within their respective jurisdictions, of their international obligations) the question whether the Government has, or has not, acted with "due diligence" in a particular case, is one which is incapable of being determined abstractedly, without reference to those laws. If the inquiry be, whether the provision which the national laws have made for the performance of international obligations is in fact just, and reasonably sufficient, it is impossible rationally to deny that principles of administration and rules of legal procedure which experience has proved to be just, and reasonably sufficient for all the great purposes of internal government, (the primary objects for which all Governments exist,) may be generally adhered to when the legal repression of acts injurious to foreign States becomes necessary, without exposing the national Government which relies on them to the imputation of a want of due diligence.

11. Objections to any theory of the diligence due from neutral Governments, which involves a universal hypothesis of arbitrary power.

Any theory of diligence in the performance of international obligations which implies that foreign Governments, to whom such obligations are due, owe no respect whatever to the distinctive Constitutions of national Governments, or have a right to call for their violation in particular cases, or to dictate legislative changes at variance with them, would be fatal to

national independence; and (as no great Power could tolerate or submit to it) would tend, not to establish, but to subvert the peace and amity of nations. In the words of the British Summary, (page 9, sec. 30,) "its tendency, if admitted, would be to introduce a universal hypothesis of absolute and arbitrary power as the rule of judgment for all such international controversies." The practical falsehood of such a hypothesis, as applied at the present time to the two nations engaged in the present controversy, to the three nations which furnish the judges of that controversy, and to most of the other civilized nations of the world—its probably universal falsehood as to every European and American State in the not remote future—is perhaps not the gravest objection to it. It is at variance with all the highest principles of progress, of advancing liberty, and of extended civilization, which distinguish modern society. If the dreams of some political philosophers could be accomplished, and if all the nations of the earth could be united in one great federation under the most perfect imaginable political constitution, the rights both of particular States, and of individual citizens, and all questions, whether as to the repression and prevention, or as to the punishment of unlawful acts by States or citizens, would certainly be determined, not by arbitrary power, but by fixed and known laws and settled rules of procedure. Is it conceivable that it should enter into the mind of man (nay, of citizens of one of the freest States in the world, whose whole history is a refutation of such a doctrine) that practical impossibilities, which (if they were possible) would be hostile to the highest interests and intelligence of mankind, can be demanded by one State of another, in the name of international law?

IV.—*On the preventive powers of the Laws of Great Britain.*

There are several passages, in the Argument of the United States, which appear (A) to contend that the Royal Prerogative in Great Britain actually extends, under the British Constitution, to a power of summary and arbitrary control, without legal procedure, over the persons and property of its citizens, when there is any ground to suppose that such citizens may be about to act, or that such property may be about to be employed, in a manner hostile to a foreign belligerent Power, with which Her Majesty is at peace; and (B) to assume that, if such a prerogative power does not actually exist under the British Constitution, the very fact of its absence is proof of a defect of British law, in itself amounting to an abnegation of the use of due diligence (or, what is the same thing, to a want of the means of due diligence) for the prevention of such acts.

12. The Argument of the United States, as to the necessity of a reliance on Prerogative, for due diligence.

There are, also, other passages which assert (C) that "Great Britain pretends that punitive law is the measure of neutral duties;" while (D) "all other Governments, including the United States, prevent peril to the national peace by means of prerogative force, lodged, by implied or express constitutional law, in the hand of the Executive," (page 37.)

These arguments require to be severally examined.

(A.) The following passages embody the American argument as to the prerogative power, supposed by it to be actually vested in the Crown of Great Britain:

13. The arguments as to prerogative powers belonging to the British Crown.

(1.) We find, on the most cursory observation of the Constitution of Great Britain, that the declaration of war, the conclusion of peace, the conduct of foreign affairs, that all these things are in Great Britain elements of the prerogative of the Crown.

We cannot believe, and do not concede, that in all these greater prerogative powers there is not included the lesser one of *preventing* unauthorized private persons from en-

gaging in private war against a friendly foreign State, and thus committing Great Britain to causes of public war on the part of such foreign State, (pages 24, 25.)

(2.) The whole body of the powers, suitable to the regulation and maintenance of the relations of Great Britain, *ad extra*, to other nations, is lodged in the prerogative of the Crown. The intercourse of peace, the declaration and prosecution of war, the proclamation and observance of neutrality, (which last is but a division of the general subject of international relations in time of war,) are all, under the British Constitution, administered by the Royal Prerogative.

We refer to the debates in Parliament upon the Foreign-Enlistment Bill in 1819, and on the proposition to repeal the Act in 1823, and to the debate upon the Foreign Enlistment Bill of 1870, (as cited in Note B of the Appendix to this Argument,) as a clear exhibition of this doctrine of the British Constitution, in the distinction between the Executive power to *prevent* violations of international duty by the nation, through the acts of individuals, and the *punitive* legislation in aid of such power, which needed to proceed from Parliament.

We refer, also, to the actual exercise of this Executive power by the Government of Great Britain, without any enabling act of Parliament to that end, in various public acts in the course of the transactions now in judgment before the Tribunal.

1. The Queen's Proclamation of Neutrality, May 13, 1861.

2. The regulations issued by the Government of Her Britannic Majesty in regard to the reception of cruisers and their prizes in the ports of the Empire, June 1, 1861—June 2, 1865.

3. The Executive orders to detain the Alabama at Queenstown and Nassau, August 2, 1862.

4. The Executive orders to detain the Florida at Nassau, August 2, 1862.

5. The Executive orders to detain the rams at Liverpool, October 7, 1863.

6. The debate and vote in Parliament justifying the detention of the rams by the Government "on their own responsibility," February 23, 1864.

7. The final decision of Her Majesty's Government in regard to the Tuscaloosa, as expressed by the Duke of Newcastle to Governor Wodehouse, in the following words: "If the result of these inquiries had been to prove that the vessel was really an uncondemned prize, brought into British waters in violation of Her Majesty's orders made for the purpose of maintaining her neutrality, I consider that the mode of proceeding in such circumstances most consistent with Her Majesty's dignity, and most proper for the vindication of her territorial rights, would have been to prohibit the exercise of any further control over the Tuscaloosa by the captors, and to retain that vessel under Her Majesty's control and jurisdiction, until properly reclaimed by her original owners." November 4, 1863.

8. The Executive order that, "for the future no ship of war belonging to either of the belligerent Powers of North America shall be allowed to enter or to remain, or to be in any of Her Majesty's ports for the purpose of being dismantled or sold." September 8, 1864.

9. The final Executive orders to retain the Shenandoah in port "by force, if necessary," and to "forcibly seize her upon the high seas." September and October, 1865.

10. The rejection by Parliament of the section of the new Foreign-Enlistment Bill, which provided for the exclusion from British ports of vessels which had been fitted out or dispatched in violation of the Act, as recommended by the Report of the Royal Commission. This rejection was moved by the Attorney-General and made by Parliament, on the mere ground that this power could be exercised by Order in Council.

That these acts were understood by the Government of Great Britain to rest upon the prerogative and its proper exercise, is apparent from the responsible opinions of the Law Officers given upon fitting occasions, (pages 323–325.)

These passages exhibit a very strange confusion of ideas, between the prerogative of the British Crown, as representing the British nation in its external relations towards foreign Powers, not subject to its laws, and its means of control within its own territory over its own citizens or commorant subjects, its relations to whom are created and defined by those laws. The declaration of war and peace, or of neutrality in a foreign war; the issuing orders and regulations as to the reception of foreign cruisers or their prizes in British ports; the exercise of control over foreign belligerent vessels or prizes (as in the supposed case of the Tuscaloosa) brought into British ports by a belligerent Power contrary to Her Majesty's orders and regulations; the exclusion of foreign belligerent vessels from being brought into British ports to be dismantled or sold, or from being brought into such ports at all, if originally fitted out or dispatched from British territory in violation of British law; the

seizure of a foreign vessel, (as in the supposed case of the Shenandoah,) if found committing depredations on the high seas, after the belligerency of the Power, by which she was commissioned, had ceased; all these are acts within the former category, concerning the external relations of Great Britain towards foreign Powers, not subject to British law or to British national jurisdiction.

The Executive orders to detain the Alabama at Queenstown and Nassau, the Florida at Nassau, and the rams at Liverpool, were on the other hand all issued by virtue of the powers with which the British Government was armed against its own subjects by British municipal law, (viz, by the Foreign-Enlistment Act of 1819,) and not by virtue of any actual or supposed prerogative of the Crown.

The words used by the British Attorney-General in Parliament, on the 23d of February, 1864, with reference to the detention of the rams at Birkenhead, (or to the preliminary notice that they would be seized if any attempt were made to remove them,) have been several times quoted in the American Argument.[1] Those words were, that the Government had given the orders in question, "on their own responsibility." But this does not mean that the orders given were, or were supposed to be, founded on any other authority than the powers of seizure given by the Foreign-Enlistment Act; to which reference had been expressly made, as the authority for what was done, in a letter to the Law-Officers dated October 19, 1863, also quoted at page 351.

Those orders were necessarily given upon the responsibility of the Executive Government, on whom the burden was thrown, by the Foreign-Enlistment Act, of first taking possession of an offending vessel, in any case in which they might have reasonable ground for belief that the law was, either by act or by attempt, infringed; and afterward justifying what they had done by a regular judicial proceeding for the condemnation of that vessel, in the proper Court of Law. Exactly the same language had been used, by the same Law-Officer of the British Government, when Solicitor-General, in a previous debate on the seizure of the Alexandra, (24 April, 1863, Hansard's Debates, vol. clxx, pp. 750, 752.) After expressly saying that "in this case everything had been done according to law," he added, "it was our duty, upon having *prima-facie* evidence which, in our judgment, came up to the requirements of the clause, to seize the ship or vessel, according to the form of proceeding under the Customs Acts. There is no other way of dealing with the ship; you cannot stop the ship by going before a magistrate; it must be done upon the responsibility of the Government; and so it has been done."

14. The true doctrine as to the powers of the Crown under British law.

The fundamental principles of British Constitutional Law, relative to this branch of the Argument, will be found in all the elementary works on that subject. The subjoined extracts are from Stephen's edition of Blackstone's Commentaries:

It is expressly declared, by Statutes 12 and 13, William III, cap. 2, that the laws of England are the birthright of the people thereof; and all the Kings and Queens who shall ascend the throne of this realm ought to administer the Government of the same according to the said laws; and all their officers and ministers ought to serve them respectively according to the same. (Vol. ii, p. 424, 6th edition.)

Since the law is in England the supreme arbiter of every man's life, liberty, and property, Courts of Justice must at all times be open to the subject, and the law be duly administered therein. (Ibid., p. 505.)

The law of nations * * is a system of rules established by universal consent among the civilized inhabitants of the world. * * * As none of these (independent) States will allow a superiority in the other, therefore, neither can dictate nor prescribe the

[1] Pages 25, 151, &c.

rules of this law to the rest; but such rules must necessarily result from those principles of natural justice in which all the learned of every nation agree, and to which all civilized States have assented. In arbitrary States, this law, wherever it contradicts, or is not provided for by, the municipal law of the country, is enforced by the Royal power; but, since in England no Royal power can introduce a new law, or suspend the execution of the old, therefore the law of nations, whenever any question arises which is properly the subject of its jurisdiction, is here adopted in its full extent by the common law, and held to be the law of the land. Hence those Acts of Parliament which have from time to time been made to enforce this universal law, or to facilitate the execution of its decisions, are not to be considered as introductive of any new rule, but merely as declaratory of the old fundamental constitutions of this kingdom, without which it must cease to be a part of the civilized world. * * * (Vol. iv, pages, 302, 303.)

With respect to the particular question of the power of the British Crown to prevent, by virtue of its prerogative, the building of ships of war for foreign Powers within its dominions, the law of Great Britain was authoritatively explained as long ago as 1721.

In Michaelmas vacation, 1721, (says Fortescue, in his Reports, page 388,) the Judges were ordered to attend the House of Lords concerning the building of ships of force for foreigners; and the question the Lords asked the Judges was, whether by law His Majesty has a power to prohibit the building of ships of war, or of great force, for foreigners, in any of His Majesty's dominions? And the Judges were all of opinion, except Baron Mountague, (Chief Justice Pratt delivering their opinion,) that the King had no power to prohibit the same; and declared that Mountague said he had formed no opinion thereon. This question was asked on the occasion of ships built and sold to the Czar being complained of by the Minister of Sweden. Trevor and Parker gave the same opinion in 1713.

15. The American view of an *a priori* obligation on this subject.

(B.) In the following passages of their Argument, the American Counsel appear to contend that the British Government must be deemed to have been wanting in due diligence because they proceeded by law, and not by suspension of law, or by prerogative without law.

(1.) Apart from other and direct proofs of permission, or knowledge and sufferance, the responsibility for any injury is fixed on the local Sovereign, if he depend on municipal means of enforcing the observance of international obligations, instead of acting preventively to that end in his prerogative capacity as sovereign. (P. 23.)

(2.) The next great failure of Great Britain to use *due diligence to prevent* the violation of its neutrality, in the matters within the jurisdiction of the tribunal, is shown in its entire omission to exert the direct Executive authority, lodged in the Royal Prerogative, to intercept the preparations and outfits of the offending vessels, and the contributory provisions of armament, munitions, and men, which were emitted from various ports of the United Kingdom. We do not find in the British Case or Counter Case any serious contention, but that such powers as pertain to the Prerogative, in the maintenance of international relations, and are exercised as such by other great Powers, would have prevented the escape of every one of the offending vessels emitted from British ports, and precluded the subsidiary aids of warlike equipment and supplies which set them forth and kept them on foot for the maritime hostilities which they maintained. (Page 165.)

(3.) The British Ministers do not scruple to suspend the privileges of the writ of *habeas corpus*, whether with or without previous parliamentary authorization, and whether in the United Kingdom or in the Colonies, on occasion of petty acts of rebellion or revolt; that is, in the case of *domestic war; a fortiori*, they should and may arrest and prevent subjects or commorant foreigners engaged in the commission of acts of foreign war to the prejudice of another Government. (P. 25.)

The answer to these arguments has been, in substance, anticipated; but with respect to each of them, a few further remarks may not be superfluous.

With respect to the first, it is difficult to understand whether the Counsel for the United States mean to imply (in the face of the admission as to the limitation of the powers of their own President to such authority as was expressly conferred upon him by the Acts of Congress of 1794, 1817, and 1818, which is found at page 27 of their Argument) that the President of the United States has a "prerogative capacity as Sovereign," by which he can "act preventively," or that he does not

"depend upon municipal means" for the enforcement of such international obligations as are now in question with Great Britain. Legal powers conferred upon the President of the United States by Acts of Congress for the performance of international obligations, are as much "municipal means" as legal powers conferred upon the Sovereign of Great Britain by an Act of the British Parliament, for the like purpose.

With respect to the second passage, it is to be observed, that it not only imputes as a want of due diligence the abstinence from the use of arbitrary powers to supply a supposed deficiency of legal powers, but it assumes that the United States has a right, by international law, to expect Great Britain to prevent the exportation from her territory of what it describes as "contributory provisions," arms, munitions, and "subsidiary aids of warlike equipment and supplies," though such elements of armaments were uncombined, and were not destined to be combined, within British jurisdiction, but were exported from that territory under the conditions of ordinary exports of articles contraband of war. For such a pretension no warrant can be found either in international law, or in any municipal law of Great Britain, or in any one of the three Rules contained in the VIth Article of the Treaty of Washington.

The third passage requires more particular attention, because it presents, in a particularly striking manner, a radically false assumption, which pervades many other portions of the United States Argument, viz, that the acts done within British jurisdiction, which Great Britain is said not to have used due diligence to prevent, were "*acts of war*" by British subjects or commorant foreigners against the United States, justifying and calling for similar means of repression to those which might be necessary in a case of "rebellion or revolt, *i. e.*, of domestic war."

16. The British Crown has power, by common law, to use the civil, military, and naval forces of the realm to stop acts of war within British territory.

It is impossible too pointedly to deny the truth of this assumption, or too positively to state that, if any military or naval expeditions, or any other acts or operations of war against the United States, in the true and proper sense of those words, had been attempted within British territory, it would not have been necessary for the British Government either to suspend the Habeas Corpus Act or to rely on the Foreign Enlistment Act, in order to enable it to intercept and prevent by force such expeditions or such acts or operations of war. The whole civil police, and the whole naval and military forces of the British Crown would have been lawfully available to the Executive Government, by the common law of the realm, for the prevention of such proceedings. But the fact is, that nothing of this kind ever happened or was attempted, during the civil war in the United States, in Great Britain, or in any of the British Possessions, except (in the year 1863–'64) in some of the British North American Provinces; and, when such attempts were made in those provinces, the powers of the common law were at once put in force for their repression, and were strengthened by special and extraordinary legislation; nor is any complaint now made by the Government of the United States of any want of due diligence on the part of the British North American authorities in that respect. Not only was no military or naval expedition and no act or operation of war ever attempted elsewhere within British territory against the United States, but (unless the arming of the Florida at Green Cay, in the Bahamas, be an exception) no attempt was ever made in any other part of the British dominions, so much as to equip or dispatch for the Confederate service any armed vessel, by which the question whether it had or had not the character

of a naval expedition prohibited by international law might have been raised.

17. The assertion of the United States that Great Britain relies on punitive, and not on preventive law, disproved.

(C.) The next propositions are, that "Great Britain alone pretends that punitive law is the measure of neutral duties"—that the powers vested in the Executive Government of Great Britain by the Foreign Enlistment Act of 1819 were punitive only, and not preventive—and that (D) "all other Governments, including the United States, prevent peril to the national peace through means of prerogative force, lodged, by implied or express constitutional law, in the hands of the Executive."

It is necessary to notice, in passing, (with reference to the points (A) and (B,) already dealt with,) the fallacy here introduced by the improper use of the term "prerogative force," to signify definite legal powers, vested by law in the Executive Government of a nation. Such is not the sense in which the word "prerogative" is used in Great Britain; nor does it appear to be that in which it is used in the parts of the American Argument already dealt with.

18. The preventive power of the British law explained.

The answer to proposition (C) is, simply, that it is without foundation in fact. Great Britain has never pretended that punitive law is the measure of neutral duties; it is not true that the powers vested in the Executive Government of Great Britain by the Foreign Enlistment Act of 1819, were punitive only and not preventive. If the powers given, by the Acts of Congress already mentioned, to the President of the United States, can with any propriety of language be described as powers to "prevent peril to the national peace by means of prerogative force," the same description is equally applicable to the powers given to the Executive Government of Great Britain, by the Foreign Enlistment Act of 1819.

That Act, as already noticed, prohibited under penalties the equipment or armament of ships for foreign belligerent service; the augmentation of the warlike force of foreign ships of war; and the enlistment or recruitment of men for foreign belligerent service. *It prohibited also any attempt or endeavor to do any of those acts*—the prohibition as to ships, &c., being restricted to acts done, or attempts made, within British jurisdiction. So far as this Act imposed penalties, it was of course punitive. But it was preventive also, (for which reason it struck at attempts and endeavors, as well as acts)—and prevention was the main purpose for which it was passed, as appears from the preamble, which recites, that the laws previously in force "were not sufficiently effectual for *preventing* the prohibited acts."

These preventive powers are contained in the fifth, sixth, and seventh sections. The fifth and sixth sections authorized the Executive Government, in any part of the British dominions, upon receiving information on oath of the violation of the provisions against enlistment by persons on board any vessel within British jurisdiction, to detain such vessel, and prevent her from proceeding to sea on her voyage with the persons so unlawfully enlisted on board; and also to detain her until certain penalties had been paid, if her commander had been privy to the unlawful enlistment. The seventh section authorized any officer of Customs or Excise, or any other officer of the British navy, by law empowered to make seizures for any forfeiture incurred under any of the laws of Customs or Excise or the laws of trade and navigation, to seize any ship or vessel equipped or armed, or attempted to be equipped or armed, contrary to its provisions, in such places and in such manner, in which the same officers respectively would be empowered to make seizures

under the laws of Customs or Excise, or under the laws of trade and navigation.

The powers of seizure (to be followed afterward by proceedings in the Court of Exchequer for the condemnation of the vessel) which from 1860 to 1866 were available for the purpose of prevention under this statute, are contained in section 223 of the British Customs Law Consolidation Act of 1853, and in section 103 of the Merchant Shipping Act of 1854. By section 223 of the Customs Act, power was given to any officer of Her Majesty's Navy, duly employed for the prevention of smuggling, and on full pay, or any officer of Customs or Excise, to seize or detain, in any place, either upon land or water, all ships and boats, and all goods whatever, liable to forfeiture. By section 103 of the Merchant Shipping Act, power was given to any commissioned officer on full pay in the naval service of Her Majesty, or any British officer of Customs, to seize and detain any ship, which might, either wholly or as to any share thereof, have become liable to forfeiture under that Act.

The papers before the Arbitrators contain several instances of the employment of officers in Her Majesty's naval service, both at Liverpool and at Nassau, for the execution of duties connected with the enforcement of these laws. In most cases those duties were intrusted in practice to the officers of Her Majesty's Customs; but the whole naval force of the British Kingdom might, in case of need, have been lawfully employed, within British jurisdiction, in aid of those officers. When the Georgia was reported to have gone to Alderney, a British ship of war was sent there after her; and if the commander of that ship had found her in British waters, and had ascertained the existence of any grounds warranting her detention, she would have been undoubtedly detained by him. Whenever evidence was forthcoming of an actual or contemplated illegal equipment of any vessel within British jurisdiction, there was ample preventive power under these statutes. Without such evidence, no rule of international law gave a foreign State the right to require that any vessel should be prevented from leaving the British dominions.

19. The doubtful points as to the construction of the British Foreign Enlistment Act never affected the diligence of the British Government.

The United States have referred, in their Argument, to the question raised as to the interpretation of the British Foreign-Enlistment Act before the English Court of Exchequer, in the case of the Alexandra, and to the opinion in favor of its more restricted construction, which prevailed in that case; the judges being equally divided, and the right of appeal being successfully contested on technical grounds. But in another case (that of the Pampero) a Scottish Court of equal authority adopted the more extended construction upon which the British Government, both before and after the case of the Alexandra, always acted; and, as no vessel was ever employed in the war service of the Confederate States, which was enabled to depart from Great Britain by reason of this controversy as to the interpretation of the Act, it would seem to be of no moment to the present inquiry, even if it had related to a point, as to which Great Britain owed some antecedent duty to the United States by international, as distinguished from municipal, law. But the controversy did not in fact relate to any such point. There was no question as to the complete adequacy of the provisions of that Statute to enable the British Government to prevent the departure from British jurisdiction of any warlike expedition, or of any ship equipped *and armed*, or attempted to be equipped *and armed*, within British jurisdiction, for the purpose of being employed to cruise or carry on war against the United States. The sole question was, whether the language of the prohibition

comprehended a ship built and specially adapted for warlike purposes, but not armed or capable of offense or defense, nor intended so to be, at the time of her departure from British jurisdiction. All the judges were of opinion that the departure of such a ship from neutral territory was not an act of war, was not a hostile naval expedition, and was not prohibited, *inter gentes*, by general international law; and two of them thought that, not having any of those characters, it was also not within the prohibitions of the Statute; while the other two were of opinion that the existence of those characters was not, under the words of the law, a necessary element in the municipal offense.

20. Baron Bramwell's view of the international, as distinct from municipal obligation, agreed with that of the American Attorney-General in 1841.

The language of Baron Bramwell, an eminent British Judge, (afterwards a member of the British Neutrality Laws Commission,) explains clearly and forcibly the view of the case, as it would have stood under international law only, which was taken by the entire Court:

If we look at the rights and the obligations created by international law, if a hostile expedition, fitted out by a State, leaves its territory to attack another State, it is war; so also, if the expedition is fitted out, not by the State but with its sufferance, by a part of its subjects or strangers within its territories, it is war, at least in the option of the assailed. They would be entitled to say, either you can prevent this or you cannot. In the former case it is your act, and is war; in the latter case, in self-defense we must attack your territory, whence this assault on us proceeds. And this is equally true, whether the State assailed is at war or at peace with all the world.

The right in peace or war is not to be attacked from the territory of another State; that that territory shall not be the basis of hostilities. But there is no international law forbidding the supply of contraband of war; and an armed vessel is, in my judgment, that and nothing more. It may leave the neutral territory under the same conditions as the materials of which it is made might do so. The State interested in stopping it must stop it as it would other contraband of war, viz, on the high seas.

Not only is the doctrine thus stated conformable to all the authorities of international law, to which reference has been made in the earlier part of this paper, but the same doctrine was officially laid down by Mr. Legare, then Attorney-General of the United States, in December, 1841, when advising his Government that two schooners of war, built and fitted out, and about to be furnished with guns and a military equipment, in New York, for Mexican service against Texas, ought to be treated as offending against the Act of Congress of 1818. He says:

The policy of this country (the United States) is, and ever has been, perfect neutrality, and non-interference in the quarrels of others. But, by the law of nations, that neutrality may, in the matter of furnishing military supplies, be preserved by the two opposite systems, viz, either by furnishing both parties with perfect impartiality, or by furnishing neither. For the former branch of the alternative it is superfluous to cite the language of publicists, which is express, and is doubtless familiar to you. *If you sell a ship of war to one belligerent, the other has no right to complain, so long as you offer him the same facility. The law of nations allows him, it is true, to confiscate the vessel as contraband of war, if he can take her on the high seas; but he has no ground of quarrel with you for furnishing or attempting to furnish it.* But, with a full knowledge of *this undoubted right of neutrals*, this country has seen fit, with regard to ships of war, to adopt the other branch of the alternative, less profitable with a view to commerce, but more favorable to the preservation of a state of really pacific feeling within her borders. She has forbidden all furnishing of them, under severe penalties. (British Appendix, vol. v, p. 360.)

V.—*On the preventive powers of the Laws of Foreign Countries.*

21. On the arguments as to due diligence derived by the United States from foreign laws.

(D.) It now becomes necessary to observe upon the proposition, that "all other Governments, including the United States, prevent peril to the national peace through means of prerogative force, lodged by implied or express constitutional law in the hands of the Executive." In other words, a general want of diligence is sought to be established against Great Britain,

by an argument derived from the laws of the United States, and of other countries, with a view to show, by the comparison, the insufficiency of the preventive powers of British law.

To the whole principle of this argument, so far as it relates to matters not prohibited by the general law of nations, Great Britain demurs; and, even with respect to matters which are prohibited by that general law, it is obvious that nothing can be more fallacious than an attempt at comparison, which, without exact and special knowledge of the whole complex machinery of laws, judicature, and legal procedure, and political and civil administration, which prevails in each different country, can pretend to decide on the relative efficiency of those various laws for political purposes. The materials, however, on which reliance is placed for this comparison in the American Argument, are so manifestly scanty and insufficient as to make the answer to this part of the argument simple, even if it were in principle admissible.

As to the laws of France, Italy, Switzerland, Portugal, Brazil, Belgium, and the Netherlands, and, in fact, of almost every country mentioned in the Argument, except the United States, it can hardly be thought that the Counsel for the United States understand these laws, which are all substantially the same, better than M. Van Zuylen, the Netherlands Minister, who has to administer them, and who, in reply to certain inquiries from the British Chargé d'Affaires at the Hague, wrote:

> There is no code of laws or regulations in the Kingdom of the Netherlands concerning the rights and duties of neutrals, nor any special laws or ordinances for either party on this very important matter of external public law. The Government may use Articles 84 and 85 of the Penal Code, but no legislative provisions have been adopted to protect the Government, and serve against those who attempt a violation of neutrality. It may be said that no country has codified these regulations and given them the force of law; and, though Great Britain and the United States have their Foreign-Enlistment Act, its effect is very limited.

This language is criticised in the American Argument as "inaccurate," but it is in reality perfectly exact, for such provisions as those of Articles 84 and 85 of the French Penal Code cannot possibly be described as either prohibiting or enabling the Government to prevent those definite acts and attempts against which it was the object of the British and the American Foreign-Enlistment Acts to provide. These Articles are punitive only, and they strike at nothing but acts, unauthorized by the Government, which may have "exposed the State to a declaration of war," or "to reprisals." The language of the corresponding laws of almost all the other States, except Switzerland, is admitted to be similar. That of Switzerland prohibits generally, under penalties, all "acts contrary to the law of nations," while it regulates (by enactment, the particular provisions of which are not stated) the enlistment of troops within the Swiss Federal territory."

No man having the least knowledge of the laws and constitutional systems of Great Britain and the United States can be supposed to imagine that enactments conceived in these vague and indefinite terms, if they had been adopted by either of those countries, would have been of the smallest use for the purpose of preventing such acts as those of which the Government of the United States now complain; much less that they would have been comparable in point of efficiency with the definite means of prevention provided and directed against attempts, as well as acts, by the Acts of Congress and of Parliament, which were actually in force in those nations respectively.

But it is assumed, in the Argument of the United States, that these special laws were in all these countries supplemented by an elastic and

arbitrary executive power. Of this assertion no proof in detail is attempted to be given; nor is it believed to be consistent with the fact.

If the French and other Governments issued executive Proclamations forbidding their subjects to do acts of the nature now in question, so also did the Queen of Great Britian. By Her Majesty's Proclamation of Neutrality, (13th May, 1861,) she "strictly charged and commanded all her subjects to observe a strict neutrality during the hostilities" (between the United States and the Confederates,) "and to abstain from violating or contravening either the laws and statutes of the realm in this behalf, or the law of nations in relation thereto;" and she warned them, "and all persons whatsoever entitled to her protection"—

"That if any of them should presume to do any acts in derogation of their duty, as subjects of a neutral sovereign, in the said contest, or in violation of the law of nations in that behalf, as for example, and more especially, by entering into the military service of either of the said contending parties as commissioned or non-commissioned officers, or soldiers; or by serving as officers, sailors, or marines, on board any ship or vessel of war, or transport, of, or in the service of, either of the said contending parties; or by engaging to go, or going, to any place beyond the seas with intent to enlist or engage in any such service, or by procuring, or attempting to procure, within Her Majesty's dominions, others to do so; or by fitting out, arming, or equipping any ship or vessel to be employed as a ship of war, or privateer, or transport, by either of the said contending parties;" (or by breach of blockade, or carriage of contraband,) "all persons so offending would incur and be liable to the several penalties and penal consequences," by the (British Foreign-Enlistment) Act, "or by the law of nations, in that behalf imposed or denounced."

If this Proclamation referred (as it did) to British law in some cases, and to the law of nations in other cases for its sanctions, the French and all other Proclamations of the like character also had reference, for the like purposes, to their own respective national laws, and to the law of nations. Whatever surveillance may have been exercised by the French Government, according to the particular provisions of their own laws, over the builders of the rams intended for the Confederates, at Nantes and at Bordeaux, the *construction* of those vessels was at all events *not stopped;* and one of them, the Stonewall, did eventually pass into the hands of the Confederates; nor was it by any power of the French Executive, or of the French law, that she was afterward intercepted, before she had actually committed destructive acts against the shipping of the United States. The Georgia received her armament in French waters. Commodore Barron, "the head of the Confederate Navy Department in Europe,"[1] was established in Paris; a Frenchman residing in Paris, named Bravay, intervened in the Confederate interest as the ostensible purchaser of the rams at Birkenhead, and claimed them, against the seizure of the British Government, without any aid from French authority to Her Majesty's Government in their resistance to that claim. These facts are not mentioned as implying any want of proper diligence on the part of the French Government; but to show, that even in that country, at a time when the Imperial Government exercised much larger powers of control over public and private liberty than could ever be possible in Great Britain, (or, as it is believed, in the United States,) the Executive either did not possess, or did not find it practicable to exercise with the preventive efficacy which the American Argument seems to deem necessary, any merely discretionary powers of interference.

VI.—*On the Preventive Powers of the Law of the United States.*

The comparison between the law of Great Britain and the law of the

[1] See letter, dated January 27, 1865, from Consul Morse to Mr. Adams. (United States Appendix, vol. ii, p. 175.)

United States is more easy; because they have a very close historical and juridical relation to each other; and because both these nations exclude from their constitutional systems all forms of arbitrary power.

22. On the comparison made by the United States between their own laws and British law, in order to prove a general want of due diligence against Great Britain.

What then are the preventive powers, found in the several Acts of Congress from time to time passed upon this subject in the United States, and which are admitted (at page 27 of the American Argument) to be the only preventive powers which the Executive Government of the United States of right possesses? How have those powers been used in practice? And with what degree of success and efficiency so far as regards the practical object of prevention? This inquiry is directly challenged in the Case, in the Appendix to the Counter Case, and in the Argument of the United States, for the purpose (as it would seem) of showing that if the law of Great Britain had been equal in efficiency to that of the United States, and had been enforced with an equal degree of diligence, the present causes of complaint might not have arisen. Great Britain has no reason to shrink from the test of diligence so tendered on the part of the United States; nor, in accepting it, is it just to impute to her Government an intention to recriminate, to introduce any irrelevant topics, or to call in question the general good faith of the Government of the United States, in the conduct of its relations with foreign Powers.

23. Examination of the preventive powers of the American Government, under their Acts of Congress for the preservation of neutrality.

The only preventive powers material to this question, which were expressly or by implication conferred by the several Acts of Congress relating to this subject, are contained in (1) the third section of the Act of 1794, amended by the first section of the Act of 1817, and re-enacted, on the repeal of those Acts, by the third section of the Act of 1818; (2.) The seventh section of the Act of 1794, re-enacted by the eighth section of the Act of 1818; (3.) The second section of the Act of 1817, re-enacted by the tenth section of the Act of 1818; and, lastly, the third section of the Act of 1817, re-enacted by the eleventh section of the Act of 1818.

It will be sufficient to consider these different powers as they stand in the latest Act, by which the provisions of the two former were consolidated, and the former Acts themselves repealed.

(1.) Section 3 of the Act of 1818 made it penal for any person, within the limits of the United States, to "fit out *and arm*, or attempt to fit out *and arm*, or procure to be fitted out *and armed*, or knowingly to be *concerned in the furnishing, fitting out, or arming*, of any ship or vessel," with the intent that such ship or vessel should be employed in any foreign belligerent service; and forfeited every such ship or vessel, with her tackle, &c.; one-half to any informer, and the other half to the use of the United States.

This clause agrees in substance with the seventh section of the British Foreign-Enlistment Act; except that, in the definition of the principal offenses under it, it always couples armament with equipment, which the British clause, using the word "*or*" ("equip, furnish, fit out, *or* arm," &c.) instead of the word "*and*," ("fit out *and* arm," &c.,) throughout disjoins; and it omits to state by what officers, or in what manner, seizures under it are to be made, the British clause expressly empowering such seizures to be made by Her Majesty's naval officers, or officers of the Customs or Excise, authorized to make seizures under the Customs and Navigation Acts. Inasmuch, however, as forfeiture necessarily implies the power of seizure, this clause (though the means of seizure are not here defined) is one of preventive efficacy. There is a further difference, which it seems right to mention, (as it has been mentioned by

the Counsel of the United States,) viz, that half the benefit of forfeitures is given to informers.

(2.) The eighth section of the Act of 1818 is that which, in the present Argument, seems to be mainly relied on by the United States. "The American Act," says the Argument, (p. 29,) "is preventive, calls for executive action; and places in the hands of the President of the United States the entire military and naval force of the Government, to be employed by him in his discretion, for the prevention of foreign enlistments in the United States."

In reality, however, the powers given to the President by that section are dependent upon conditions, which, if an exactly similar clause had been contained in the British Foreign-Enlistment Act, would have made them inapplicable to the case of the equipment in, and departure from, British territory, of an unarmed ship of war intended for the Confederates; and as, in any case of resistance to lawful civil authority in the execution of the British laws of Customs and Navigation, or of the Foreign-Enlistment Act, the seizure which Her Majesty's officers of her Customs and Navy are authorized to make may be supported by the use of adequate force, under the direction of those officers, at Her Majesty's discretion, such an enactment would have had the effect rather of limiting than of enlarging the powers now possessed for that purpose by the British Crown.

This section authorizes the President, or such other person as he shall have empowered for that purpose, to employ such part of the land or naval forces of the United States, or of the militia thereof, as shall be judged necessary, in any one or more of the several cases there enumerated, viz:

(*a.*) In every case in which *a vessel shall be fitted out and armed*, or attempted "to be *fitted out and armed*," (*i. e.*, against the prohibitions of the third section.)

(*b.*) "Or in which the force of any vessel of war, cruiser, or armed vessel, shall be increased or augmented, (*i. e.*, against the prohibitions of the fifth section,) "by adding to the number of the guns of any such vessel which, at the time of her arrival in the waters of the United States, was in the service of a foreign Prince, &c., or by changing those on board of her for guns of a larger caliber, or by the addition thereto of any equipment solely applicable to war."

(*c.*) "Or in which any military expedition or enterprise shall be begun to be set on foot contrary to the provisions and prohibitions of this Act;"[1] (*i. e.*, against the prohibitions of the sixth section, which makes it penal for any person "within the territory or jurisdiction of the United States" to "begin or set on foot or provide the means for any *military expedition or enterprise to be carried on from thence* against the territory or dominions of any foreign State," &c.)

(*d.*) "And in every case of the capture of a ship or vessel within the jurisdiction or protection of the United States, as before defined;" (*i. e.*, by the seventh section, which enables District Courts of the United States to "take cognizance of complaints, by whomsoever instituted, in cases of capture made within the waters of the United States, or within a marine league of the coasts thereof.")

(*e.*) "And in every case in which any process issuing out of any Court of the United States shall be disobeyed or resisted by any person or

[1] The words "contrary to," &c., apply, in the construction of the section, to cases (*a*,) (*b*,) and (*c*,) the particular provisions and prohibitions applicable to each case being those above stated.

persons having the custody of any vessel of war, cruiser, or other armed vessel of any foreign Prince," &c.

It will be seen that none of these cases except the first are material to the present inquiry, and that to constitute the first case the vessel must have been *armed, or attempted to be armed*, within the jurisdiction of the United States.

The purposes for which, in any of these cases, the President is authorized by the section to employ the land or naval forces or the militia of the United States are the following:

(*a*.) "For the purposes of detaining any *such* ship or vessel, with her prize or prizes, if any, in order to the execution of the prohibitions and penalties of this Act;" (a purpose applicable only to such ships or vessels as are comprehended within cases (*a*,) (*b*,) (*d*,) and (*e*).)

(*b*.) "And to the restoring the prize or prizes in cases in which restoration shall have been adjudged;" (a purpose applicable only to cases (*d*) and (*e*).)

(*c*.) "And also for the purpose of preventing the carrying on any *such* expedition or enterprise from the territories or jurisdiction of the United States against the territories or dominions of any foreign Prince," &c.; (a purpose applicable only to case (*c*).)

It is thus seen that all these powers of prevention given by section 8 to the President are limited, and not arbitrary, and that they would none of them have been applicable to prevent the departure from the United States of an unarmed vessel, not intended to be armed within American jurisdiction, built and equipped within the United States, and dispatched from thence for the use and service of a belligerent.

Nor is there believed to be any trace in the annals of the law or history of the United States of their ever having been employed for such a purpose.

But, further, this eighth clause of the Act of Congress of 1818 is a re-enactment of the seventh clause of the Act of 1794, the purpose and effect of which was examined and authoritatively explained by the Supreme Court of the United States in the year 1818, in the case of "Gelston *vs.* Hoyt," (reported in the fourth volume of Judge Curtis's Reports, pages 211–231.) An action was brought against certain officers of the Customs of the United States for the wrongful seizure of a vessel, and they attempted (among other things) to justify themselves by pleading that in taking possession of and detaining the ship they had acted under the instructions of the President, given by virtue of the seventh section of the act of 1794. That defense was disallowed, on the grounds that the plea *did not allege any forfeiture under the third section, nor justify the taking or detaining the ship for any supposed forfeiture*, and did not show that the defendants belonged to the naval or military forces of the United States, or *were employed in such capacity to take and detain the ship, in order to the execution of the prohibitions and penalties of the act.*

Mr. Justice Story, in giving the judgment of the Court, observed:

> The power thus intrusted to the President is of a very high and delicate nature, and manifestly intended to be exercised only when, by the ordinary process or exercise of civil authority, the purposes of the law cannot be effectuated. It is to be exerted on extraordinary occasions, and subject to that high responsibility which all executive acts necessarily involve. Whenever it is exerted, all persons who act in obedience to the executive instructions, *in cases within the act*, are completely justified in taking possession of and detaining the offending vessel, and are not responsible in damages for any injury which the party may suffer by reason of such proceeding. Surely it never could have been the intention of Congress that such power should be allowed as a shield to the seizing-officer, in cases where that seizure might be made by the ordinary civil means. One of the cases put in the section is where any process of the Courts of the United States is disobeyed and resisted; and this case abundantly shows that *the*

authority of the President was not intended to be called into exercise, unless where military and naval forces were necessary to insure the execution of the law. In terms, the section is confined to the employment of military and naval forces; *and there is neither public policy nor principle to justify an extension of the prerogative beyond the terms in which it is given.* Congress might be perfectly willing to intrust the President with the power to take and detain *whenever, in his opinion, the case was so flagrant that military or naval forces were necessary to enforce the laws*, and yet, with great propriety, deny it where, from the circumstances of the case, the civil officers of the Government might, upon their private responsibility, without any danger to the public peace, completely execute them. *It is certainly against the general theory of our institutions to create great discretionary powers by implication, and in the present instance we see nothing to justify it.*

In how many instances it has been found necessary, or thought proper, to call into exercise this power of the President of the United States, it would not be material for the present purpose to inquire. It seems enough to observe, that in order to call this power into exercise at all in any case of a vessel equipped or adapted for war within the United States, there must be a state of facts established or deemed capable of being proved in due course of law, constituting an infringement of the prohibitory and penal clauses of the Act of 1818, and producing a forfeiture of the vessel by reason of that infringement; and that, in any corresponding case under the British Foreign-Enlistment Act of 1819, the Queen of Great Britain possessed similar and not less effective powers, to fortify the ordinary administration of the law, in case of need, by the use of extraordinary force, as was exemplified by the employment of a force under the command of Captain Inglefield, at Birkenhead, in 1863, to prevent the forcible removal of the iron-clad rams from the Mersey.

3. The tenth section of the Act of Congress of 1818 requires security to be given by "the owners or consignees of *every armed ship or vessel* sailing out of the ports of the United States, belonging wholly or in part to citizens thereof," against the employment of such ship or vessel "*by such owners*, to cruise or commit hostilities against any foreign Prince," &c. This clause is inapplicable to any ship not actually *armed* within the jurisdiction of the United States; and, even as to any vessel so armed, no security is required, unless it is owned by citizens of the United States; nor, even as to a ship so armed and so owned, is any security required against her employment to cruise or commit hostilities by any foreign Power, to whom it may be transferred after leaving the waters of the United States.

4. The eleventh section of the same Act authorizes and requires the collectors of United States Customs "to detain *any vessel manifestly built for warlike purposes*, and about to depart from the United States, *of which the cargo shall principally consist of arms and munitions of war*, when the number of men shipped on board, or other circumstances, shall render it probable that such vessel is intended to be employed *by the owner or owners* to cruise or commit hostilities upon the subjects, citizens, or property, of any foreign State, &c., until the decision of the President be had thereon, or until the owner or owners shall give such bond and security as is required of the owners of armed ships by the preceding section."

The power thus given to detain ships "manifestly built for warlike purposes," when circumstances "render it probable that they are" intended to be employed "to cruise or commit hostilities upon the subjects, &c., of a foreign State," &c., is confined to the single case, *in which such ships have a cargo, principally consisting of arms and munitions of war;* and even in that case it ceases, upon security being given, in the same manner as under the tenth section, *i. e.*, security against the employment of the ship *by her then existing owners* to cruise or commit hostilities

against any foreign State, leaving her perfectly free to be so employed by any foreign owner to whom she may afterwards be transferred.

It is honorable to the candor of Mr. Bemis, an American writer, not partial certainly to Great Britain, (some of whose controversial writings have been brought before the Arbitrators as part of the evidence of the United States, in vol. iv of their Appendix, pp. 12–32 and 37–46,) that he pointed out, in a work published in 1866, from which extracts will be found in Annex (B) to the British Counter Case, (pp. 149, 150,) the inferiority (not superiority) for preventive as well as for other purposes of the Act of Congress of 1818 (the only law then and now in force in the United States for the maintenance of their neutrality) as compared with the British Foreign-Enlistment Act of 1819. Nor was there any reason to complain of the fairness of Mr. Seward, when (disregarding, as in his view practically unimportant, all those points of detail in respect of which these two Acts differed from each other) he described the laws made for this purpose in the United States on the 9th April, 1863, as "in all respects the same as those of Great Britain," and on the 11th of July, 1863, as "exactly similar." (See Annex (A) to the British Argument or Summary, page 40.) But it is certainly astonishing, after these acknowledgments, (and in view of the facts above stated,) now to find these differences between the British and American Statutes insisted upon, in the Argument of the United States, as amounting to nothing short of the whole difference between a merely penal Statute and a law intended, and effective, for the purpose of prevention; and as constituting, on that account, a sufficient ground for inferring, *a priori*, a general want of due diligence on the part of Great Britain, with respect to all the matters covered by the present controversy.

24 Testimonies of Mr. Bemis and Mr. Seward on this subject.

Some reference must here be made to an argument, derived by the Counsel of the United States from the fact that a considerble change and amendment of the British law has since been made, and that new preventive powers (of a kind not found, either in the Act of Congress of 1818 or in the British Act of 1819) have been conferred upon the Executive Government of Great Britain, by a recent Statute passed by the British Legislature in 1870. The Legislature of the United States has not yet thought it necessary or expedient to introduce any similar or corresponding provisions or powers into the law of that country; it cannot, therefore, be supposed that the Government of the United States deems such provisions or powers to be indispensable to enable a constitutional Government, the Executive of which is bound to act according to law, to fulfill, with due diligence, its international obligations. No one can seriously contend that because, after experience gained of the working of a particular law or administrative machinery of this nature, certain points may be found, on a deliberate examination, in which it appears capable of being improved, this is a proof that it was not, before these improvements, reasonably adequate for the fulfillment of any international obligations to which it may have been meant to be subservient. In all improvements of this kind, it is the object of wise legislation not to limit itself by, but in many respects to go beyond, the line of antecedent obligation; the domestic policy and security of the State which makes the law, and the reasonable wishes, as well as the strict rights of foreign Powers, are proper motives and elements in such legislation. No nation would ever voluntarily make such improvements in its laws, if it were supposed thereby to admit that it had previously failed to make such

25. Argument of the United States from the British Foreign-Enlistment Act of 1870.

due provision for the performance of its public duties as other Powers might be entitled to require.

26. Illustrations of the doctrine of due diligence, from the history of the United States.

With respect to the light which is thrown upon these questions by American history, it is, in the first place, to be observed that the violations of neutrality which the Government of President Washington took measures to prevent, did not include the mere building or sale of vessels adapted for war, for or to a belligerent, within the territory of the United States, or the sending abroad of such vessels. They consisted (in the words of Jefferson) in "the practice of commissioning, equipping, or manning vessels in ports of the United States to cruise on any of the belligerent parties."[1]

Next it will be seen from that history that the Government of the United States, having made (as it considered) just and reasonable provision by laws for the fulfillment of its international obligations, always, both before and after 1817–18, referred to those laws, and to the evidence and procedure required by them, as the proper measure of the diligence which it ought to use when foreign Governments complained that ships had been or were being fitted out or dispatched from ports of the United States for the war service of their enemies or revolted subjects. Of the truth of this statement, examples will be found in the letters of Mr. Mallory to Don Antonio Villalobos, (16 December, 1816,) Mr. Rush to Don Luis de Onis, (March 28, 1817,) Mr. Fisk to Mr. Stoughton, (September 17, 1817,) Mr. Adams to Don Luis de Onis, (August 24, 1818,) Mr. Adams to the Chevalier de Serra, (March 14, 1818; October 23, 1818; September 30, 1820; and April 30, 1822;) all of which are in the third volume of the Appendix to the British Case, (pages 100, 106, 120, 129, 150, 157, 158, 160;) also in the letters of District Attorney Glenn to the Spanish Consul Chacon, (September 4, 1816,) and to Secretary Monroe, (February 25, 1817,) and of Secretary Rush to Mr. Mallory and Mr. McCulloch, (March 28, 1817,) which are among the documents, accompanying the Counter-Case of the United States (Part II, pages 40, 53–56, 61, and 62;) and in those of Attorney-General Hoar to District Attorney Smith, (March 18, 1869,) and to United States Marshal Barlow, (May 10, 1869,) among the documents accompanying the Counter Case of the United States, (Part III, pages 743 and 745–747;) and in the Circular of Attorney-General Hoar to the District Attorneys, (March 23, 1869,) and in the letter of District Attorney Pierrepont to Attorney-General Hoar, (May 17, 1869;) which are in the "Cuban Correspondence, 1866–1871," accompanying the Counter Case of the United States, (pages 29 and 59.)

VII.—*Objections of the United States to the Administrative System of Great Britain, and to the evidence required for the enforcement of the Law.*

27. Arguments of the United States from suggested defects in the administrative machinery of British law, and from the evidence required by the British Government.

It appears, however, to be suggested that it was necessary, for the exercise of due diligence on the part of Her Majesty's Government, that they should have organized some system of espionage, or other extraordinary means of detecting and proving the illegal equipment of vessels, during the late civil war; that it was inconsistent with due diligence to treat evidence of illegal acts or designs, producible in a British Court of Justice, as generally necessary to constitute a "reasonable ground for believing," that an illegal equipment, which ought to be prevented, had taken place or was being attempted; and that in all such cases the officers of the British Government ought to have obtained for them-

[1] British App., vol. v, p. 242.

selves the proper evidence, without asking for assistance from the Ministers, Consuls, or other Agents of the United States.

We present now [says the Argument of the United States, pages 157 to 160] to the notice of the Arbitrators, certain *general facts* which inculpate Great Britain for failure to fulfill its obligations in the premises, as assigned by the Treaty.

1. The absolute omission by Great Britain to organize or set on foot any scheme or system of measures, by which the Government should be put and kept in possession of information concerning the efforts and proceedings which the interest of the rebel belligerents, and the co-operating zeal or cupidity of its own subjects, would, and did, plan and carry out, in violation of its neutrality, is conspicuous from the outset to the close of the transactions now under review. All the observations in answer to this charge, made in contemporary correspondence or in the British Case or Counter Case, necessarily admit its truth, and oppose the imputation of want of "due diligence" on this score upon the simple ground that the obligations of the Government did not require it, and that it was an unacceptable office, both to Government and people.

Closely connected with this omission was the neglect to provide any systematic or general official means of immediate action in the various ports or ship-yards of the kingdom, in arrest of the preparation or dispatch of vessels, threatened or probable, until a deliberate inspection should *seasonably* determine whether the hand of the Government should be laid upon the enterprise, and its project broken up and its projectors punished. The fact of this neglect is indisputable; but it is denied that the use of "due diligence to prevent," involved the obligation of any such means of prevention.

We cannot fail to note the entire absence from the proofs presented to the Tribunal of any evidence exhibiting any desire or effort of the British Government to impress upon its staff of officers or its magistracy, of whatever grade, and of general or local jurisdiction, by proclamation, by circular letters, or by special instructions, any duty of vigilance to detect, or promptitude to declare, of activity to discourage, the illegal outfit or dispatch of vessels in violation of international duty towards the United States.

It is not less apparent that Great Britain was without any prosecuting officers to invite or to act upon information which might support legal proceedings to punish, and, by the terror thus inspired, to prevent, the infractions of law which tended to the violation of its international duty to the United States. It was equally without any system of executive officers specially charged with the execution of process or mandates of courts or magistrates to arrest the dispatch or escape of suspected or incriminated vessels, and experienced in the detective capacity that could discover and appreciate the evidence open to personal observation, if intrusted with this executive duty.

And in another place, (page 161,) they added that—

The Arbitrators will observe the wide difference from these views and conduct of Great Britain in the estimate which the United States have put upon their duty in these respects, of spontaneous, organized, and permanent vigilance and activity, and in the methods *and efficacy of its performance*. On all the occasions upon which this duty has been called into exercise, the Government of the United States has enjoined the spontaneous and persistent activity of the corps of District Attorneys, Marshals, Collectors, and the whole array of subordinates, in the duties of observation, detection, information, detention, prosecution, and prevention.

They ask, also, (page 85,) for the assent of the Arbitrators to the views of Mr. Dudley, the United States Consul at Liverpool, when (writing to Mr. Seward with respect to the request of the British Government for evidence as to the destination of the Alabama, before such evidence had been supplied) he said:

I do not think the British Government are treating us properly in this matter. They are not dealing with us as one friendly nation ought to deal with another. When I, as the Agent of my Government, tell them from evidence submitted to me that I have no doubt about her character, they ought to accept this until the parties who are building her, and who have it in their power to show if her destination and purpose are legitimate and honest, do so. * * * The burden of proof ought not to be thrown upon us. In a hostile community like this it is very difficult to get information at any time upon these matters. And if names are to be given it would render it almost impossible. The Government ought to investigate it and call upon us for proof.

If the line of argument contained in the two first of the foregoing

28. Inconsistency of the rules of the treaty with the requirement of diligence to prevent, when there were not reasonable grounds of belief.

extracts is used for the purpose of inducing the Arbitrators to hold the British Government responsible for matters which were never actually brought to their knowledge, so as to make their prevention possible, (as in the case of the Georgia and the Shenandoah, and of the vessels which took out armaments to those ships, and to the Alabama and the Florida respectively, from Great Britain,) it appears to lose sight of the fact that, according to the express words of the first Rule, and the evident meaning of all the three Rules of the sixth article of the Treaty of Washington, the obligation to "use diligence to prevent" is consequent upon, and not antecedent to, the existence of "reasonable ground for believing," that in the particular case something which (if known) ought to be prevented, is intended to be done. If that reasonable ground for belief was in any particular case absent, there was no such obligation; and to invite the judgment of the Arbitrators upon some supposed defects in the administrative system of Great Britain, with regard to the discovery of offenses against the Foreign-Enlistment Act, or the laws of Customs and Navigation, in order to found thereon a conclusion that, under some different system of administration, facts which never actually came to the knowledge of the British Government, and of which they had no information, either from the Agents of the United States or from any other quarter, might possibly have been discovered in time for prevention, is, practically, to ask for the substitution of different Rules for those of the Treaty, and to impose retrospectively upon Great Britain obligations, which neither usage nor international law has ever hitherto recognized as incumbent upon any nation.

29. The British Government took active and spontaneous measures to acquire all proper information, and to prevent breaches of the law.

As, however, it is conceivable that this line of argument may be thought to deserve rather more attention, when it comes to be applied to cases in which information, unaccompanied by legal evidence of any actual or intended violation of the law, was given to the British Government before the departure of a vessel alleged to have been illegally equipped, it seems expedient not to pass it by without refutation.

It is a complete error to suppose that the British Government did, in fact, ever rely merely on such information and evidence of actual or intended violations of the Foreign-Enlistment Act as might reach them from the Ministers, Consuls, or Agents of the United States; or that they did not recognize and fulfill the duty of endeavoring, by the independent activity and vigilance of their own officers, and by following up all such information as reached them from any other quarters by proper inquiries made through those officers, to discover and prevent any intended breaches of the law.

The warnings of the Proclamation of Neutrality, issued at the commencement of the war, announced to all the Queen's subjects Her Majesty's determination to enforce the Foreign-Enlistment Act against all offenders, to the best of her power. Notwithstanding the statements, (already cited at page 160 of the American Argument,) it is the fact that there did exist "systematic and general means of action," adequate in all respects for the due and *bona-fide* enforcement of the law, in all the ports and places where ship-yards existed, throughout the British Empire. It is also the fact, notwithstanding what is there said, that special instructions were issued to the Custom-house authorities of the several British ports, where ships of war might be constructed, and also by the Secretary of State for the Home Department to the various authorities with whom he was in communication, to "endeavor to discover and obtain legal evidence of any violation of the

Foreign-Enlistment Act, with a view to the strict enforcement of that Statute, wherever it could really be shown to have been infringed." These instructions were repeated in or before April, 1863; and Earl Russell, when communicating that fact to Mr. Adams, (2d April, 1863, Appendix to Case of United States, vol. i, page 590,) stated that "Her Majesty's Government would be obliged to him to communicate to them or to the local authorities at the several ports any evidence of illegal acts which might from time to time become known to him."

"Of these facts," says the American Argument, "no evidence is found in the proofs submitted to the Tribunal." Is not Earl Russell's statement of the fact to Mr. Adams evidence? Is his veracity, in a matter which was necessarily within his knowledge, disputed? The British Government have not so dealt with statements made, as to matters within their knowledge, by men of honor in the public service of the United States.

But this is not all. There are facts which speak for themselves.

In the case of the Pampero (which was afterward seized and prosecuted to condemnation) and of another suspected vessel at Glasgow, information was collected by the Commissioners of Customs, and communicated to Mr. Adams by Earl Russell in a letter of the 21st of March, 1863, which was transmitted by Mr. Adams to Mr. Seward in another letter dated March 27, 1863, in which he (Mr. Adams) used these words: "It is proper to mention that the investigation appears to have been initiated by his Lordship, upon information not furnished from this Legation; and that his communication to me was perfectly spontaneous." (Appendix to the Case of the United States, vol. ii, page 203; and see British Appendix, vol. ii, page 474, &c.)

The circumstances relative to the Georgiana, after her arrival at Nassau, were first brought to the notice of Her Majesty's Government by information (derived from a New York newspaper) which they received from Mr. Archibald, the British Consul at New York, in April, 1863. This information was followed up by careful and spontaneous inquiries as to this ship and as to another vessel, called the South Carolina, said to be arming in the Clyde, neither of which proved to be intended for war. (British Appendix, vol. ii, page 158.)

In the case of the Amphion, respecting which a representation was first made by Mr. Adams on the 18th of March, 1864, inquiries had been set on foot by Her Majesty's Government as early as the preceding 13th of January. In the case of the Hawk, the first representation made by Mr. Adams was dated 18th of April, 1864; but inquiries had been previously made by the British Government, upon information received by them on the 2d of April from the Commissioners of Customs. In the case of the Ajax, as to which no representation was made before she sailed by the American Minister or Consul, careful inquiry had been made by the Customs Department in Ireland, in January, 1865; their attention having been called to the ship by the Coast-Guard officers. The action of the British Government to prevent the Anglo-Chinese flotilla, early in 1864, (as to which no obligation, municipal or international, was incumbent upon them,) from falling into the hands of the Confederates, was wholly spontaneous and unsolicited.

Furthermore: In every case in which information, however unsupported by evidence, as to any suspected vessel, was communicated to Her Majesty's Government by Mr. Adams, or otherwise, a strict watch was directed to be kept on the vessel, and special inquiries were ordered to be made by the proper persons. The results of these inquiries were reported, in every

30. The British Government followed up all information received, by the proper inquiries.

case, to Mr. Adams by Earl Russell. In a great majority of instances, even when Mr. Dudley or Mr. Morse (the United States Consul) had stated and reiterated their suspicions and belief, with the utmost confidence, and had supported it by hearsay statements, or hearsay depositions, in which mention was often made of the connection of Captain Bullock, and of the firms of Fraser, Trenholm & Co., Fawcett, Preston & Co., and W. C. Miller & Sons, or one or more of them, or other known or suspected Confederate agents, with the vessels in question, the belief of the local authorities, that the law had not been, and was not about to be, infringed, proved to be well founded. In the cases of the Florida and the Alabama, inquiries were made by the Custom-house officers, among other persons, of the builders of these ships, and other information was obtained by those officers, which was duly reported to Her Majesty's Government. Earl Russell made inquiries concerning the Florida of the Italian Government; and the zeal and activity of the proceedings of Commanders McKillop and Hinckley, at Nassau, with respect to that ship, will not be called in question. It was by means of a very difficult investigation, conducted by Her Majesty's Government, through their own Agents in France, Egypt, and elsewhere, that the evidence applicable to the rams at Birkenhead was brought up to the point necessary to establish a "reasonable ground for belief" that those rams were really intended for the Confederate service.

Nor is there any trace of proof, in any part of the voluminous Appendices to the Cases and Counter Cases on either side, that the various officers of the Customs and other civil or naval authorities to whom the duty of taking proper measures for the discovery and prevention of offenses against the Enlistment Act was intrusted, neglected any proper means, which they could and ought to have used, to obtain information or evidence. It was not, indeed, their practice to search out and interrogate all persons who might be criminally implicated by any accusation; because such persons are not obliged, by British law, or according to the general principles of justice, to answer any questions tending to criminate themselves; and also because the general experience of those accustomed to the administration of the law is, that statements voluntarily made by such persons, if really guilty, are not likely to be of assistance in the discovery of truth. Nor was any general system of espionage established; though, on what were considered proper occasions, (see British Appendix, vol. ii, page 169,) the agency of detective officers was employed by the municipal authorities for these purposes. Such a general system would be contrary to the genius and spirit of British institutions; it cannot be pretended that, to establish such a system, was part of the "diligence due" by any free country to any foreign nation. But, speaking generally, everything was done which, in the usual and proper course of the civil and political administration of affairs by the Executive Government of Great Britain, ought to have been done; and, if these means were not sufficient, in all cases, to discover and prevent (though they did prevent in most cases) the violation of the law, the experience of the British Government, in this respect, was only the ordinary experience of all Governments, with respect to the occasional success and impunity of every species of crime.

VIII.—*Results of the Administrative System, and of the practice with respect to evidence of the United States in similar cases.*

In a question of due diligence between Great Britain and the United

States, it cannot, with any show of justice or reason, be considered irrelevant, that the general system and principles, with respect to evidence and otherwise, on which the British Government acted throughout these transactions, were substantially the same as those which have been usually and in good faith acted upon, in similar cases, by the Executive Authorities of the United States. A neutral Government, though it ought spontaneously to use all proper means of discovering and preventing violations of law, which are really within its power, may, in many cases, not have the same means of knowledge which the agents of a foreign Government (to which those illegal acts would be dangerous) may happen to possess; and, when its information proceeds from those agents, it is both natural and reasonable that they should be requested to furnish evidence in support of their statements. In transactions of this kind (as Mr. Dudley stated to Mr. Seward in his first letter about the Florida, February 4, 1862, with respect to that vessel) "there is much secrecy observed;" and, when this happens, (as in ordinary cases of crime,) the preventive powers of the law cannot be called into activity, without some timely information; and the persons who give that information are usually able, and may properly be requested, to produce some evidence in its support, if such evidence is really forthcoming.

31. Necessity and propriety of seeking evidence from those who give information.

Mr. Jefferson, in his letter to Mr. Hammond, dated the 5th September, 1793, (annexed to the Treaty between Great Britain and the United States of the 19th November, 1794,) after promising to use all the means in the power of his Government to restore British prizes captured by vessels "fitted out, armed, and equipped in the ports of the United States," and brought into any of those ports by their captors after the 5th June, 1793, and acknowledging the obligation to make compensation for such prizes, if such means for their restitution should not be used, added the following just and reasonable remarks:

32. Mr. Jefferson's letter of September 5, 1793.

> Instructions are given to the Governors of the different States to use all the means in their power for restoring prizes of this last description found within their ports. Though they will, of course, take measures to be informed of them, and the General Government has given them the aid of the Custom-house officers for this purpose, yet you will be sensible of the importance of multiplying the channels of this information, as far as shall depend on yourself or any person under your direction, in order that the Governors may use the means in their power for making restitution. Without knowledge of the capture, they cannot restore it. It will always be best to give notice to them directly; but any information which you shall be pleased to send to me also, at any time, shall be forwarded to them as quickly as distance will permit.[1]

When the questions of compensation, claimed by the owners of captured British ships, which had not been restored according to this letter, came for decision before the Commissioners under the Treaty of 1794, no such claim was allowed, except when the claimant had substantiated his legal right to have the prize restored by a regular judicial proceeding, properly conducted before the proper Court of the United States; which, of course, threw upon him, in all such cases, the burden of proving, by legal evidence, the illegal outfit and armament, within the jurisdiction of the United States, of the capturing vessel.[2]

33. The onus imposed upon British claimants against the United States by the Commissioners of Claims under the treaty of 1794.

Extracts are here subjoined from some of the letters of the various authorities of the United States (to which reference has been already made) during the wars between Spain and Portugal, and their revolted Colonies in 1816–1820; and, more recently, at the time of certain designs against Cuba, in 1869. These will be found to throw some light upon the

34. Uniform reference of the Executive authorities of the United States in similar cases to legal procedure, and the necessity for legal evidence.

[1] British App., vol. v, p. 256.
[2] Case of the Elizabeth, British App., vol. v, p. 319–328.

functions and powers of the District Attorneys and Marshals of the United States, and on the practical rules by which the exercise of their functions and powers has always been governed.

On the 4th September, 1816, Mr. Glenn (District Attorney for Maryland) wrote to the Spanish Consul,(Chacon,) in answer to certain representations made by him:

I must beg leave to suggest that my powers are merely legal, and not political. I have already the power, *when I am officially informed, in a legal manner, of any violation of the laws of the United States*, to institute a prosecution against the offenders, and conduct the same to a final issue; and I hope I shall always be ready and willing to go thus far on all proper occasions. If an armament be fitting out within the district of Maryland for the purpose of cruising against the subjects of the King of Spain, it is a breach of our laws, and the persons concerned therein are liable to punishment; *but before I can take any legal steps in the affair, the facts of the case must be supported by affidavit taken before some Judge or Justice of the Peace*, and when that is done, I will, without delay, proceed to call upon the offenders to answer for a breach of our laws. *If, therefore, you will be pleased to furnish me with the names of any witnesses who can make out the case which you have stated*, I will at once have them summoned, if within the reach of the process of our Judges or Justices, and attend to taking their depositions, or, if you have it in your power to bring within this district any persons who can testify on the cases referred to, I will be prepared to receive the statements on oath as the foundation for a judicial inquiry into the conduct of the offenders. *I shall here take occasion to say that I cannot proceed in the cases you have mentioned upon the mere suggestion of any person, unless that suggestion be accompanied by an affidavit.* (Documents accompanying the Counter Case of the United States, part ii, pages 39, 40.)

On the 25th February, 1817, the same District Attorney wrote to Mr. Monroe, Secretary of State:

You are well aware *I cannot proceed to arrest persons and proceed under the laws of our country, for a breach of those laws, upon a mere suggestion alone; but whenever a suggestion shall be accompanied by anything like proof*, I will take great pleasure in prosecuting the offenders to punishment, and their property to condemnation, in all proper cases. (Ibid., pages 55, 56.)

On the 28th March, 1817, Mr. Rush (Acting Secretary of State) wrote to Mr. Mallory, Collector of Customs at Norfolk, directing him to make inquiry into the cases of two armed vessels, the Independence of the South and the Altravida, which had then lately arrived at Norfolk from voyages, in the course of which they had cruised against, and made captures of, vessels or property belonging to the subjects of the King of Spain.

If [said Mr. Rush] *there be any proof of their having committed, or of their intending to commit, an infraction of any of the laws or Treaties of the United States*, you will cause prosecutions, subject to the advice of the Attorney of the United States, to be instituted against all parties concerned, or such other legal steps taken as events may make necessary and justice require.

And on the same day, Mr. Rush also wrote to Mr. MacCulloch, Collector of Customs at Baltimore, directing inquiries to be made as to another vessel called the Congress:

If [he said] *there be any sufficient proof that this vessel either has committed, or that she intends to commit*, a breach of any of the laws or Treaties of the United States, you will advise the District Attorney, and cause prosecutions to be forthwith instituted against all parties concerned, and such other steps taken, *whether with a view to prevent* or punish offenses, *as justice requires, and the laws will sanction.*

On the 11th of April, 1817, Mr. Collector Mallory, having been requested by Don Antonio Villalobos to detain the Indepencia del Sud and the Altravida, and certain goods (in fact, prize goods) landed from that vessel, for alleged violation of the Act of Congress of 1794, answered by the request—

That I may have the aid of every light to guide me which facts can afford, and *as the allegations made by you, in an official form, must be presumed to be bottomed on positive facts which have come to your knowledge, you will have the goodness, I trust, to furnish me with evidence of their existence in your possession.*

The Spaniard replied, (12 April, 1817:)

With regard to the evidence you require. I will not hesitate to say that, as the facts I have stated are matter of public notoriety, known to everybody, and I had no reason to suppose you were ignorant of them, I did not deem it incumbent upon me to add any proof to the simple narration of them; and I was confident that, by going on to point out to you the stipulations and laws which are infringed in consequence of these facts, you would think yourself authorized to interfere in the manner requested.

He then mentioned several circumstances, justifying (as he thought) a strong presumption of illegality against those vessels, as "known facts," and added:

If these public facts, falling within the knowledge of every individual, require more proof than the public notoriety of them, I must request to be informed as to the nature of that proof, and also whether you are not warranted to act upon just grounds of suspicion, without that positive evidence which is only necessary before a Court of Justice.

Mr. Mallory rejoined, (14 April, 1817:)

From the view I have taken of the facts, as now stated by you, which it is to be presumed are to be regarded as specifications under the more general charges set forth in your letter of the 10th instant, I must really confess I do not at present see grounds sufficient to justify the steps you require me to take against the armed vessels now in this port, and the merchandise which has been permitted to be landed from them and deposited in the public store.

He then observed that, if the facts alleged as to the original equipment of the Independencia were to be taken as true, they did not clearly or unequivocally prove that her original equipment in, or dispatch from, the United States was unlawful; and, with respect to a subsequent alleged enlistment of men in the port of Norfolk, he stated that he was engaged in inquiries, in order to be satisfied upon that point before the vessel was permitted to sail, and to be governed by the result, "although," he said, "it does not appear to be perfectly certain that such an augmentation of their force is interdicted by the Act of Congress of the 3d of March last, which, being a law highly penal in its nature, will admit of no latitude of construction. (British Appendix, vol. iii, pages 112–114.)

This correspondence has the more interest, as relating to the case, in which the legality of the dispatch of the Independencia (fully armed and equipped) from an American port to Buenos Ayres, for sale there to the belligerent Government of that revolted colony, and the illegality of her subsequent augmentation of force, became the subject of decision by Mr. Justice Story in the well-known prize-suit of the Santissima Trinidad.

On the 16th September, 1817, the Spanish Consul, Mr. Stoughton, wrote to Mr. Fisk, (District Attorney for New York,) stating a case of illegal enlistment of men, then alleged to be in progress on board a Venezuela privateer schooner called the Lively, or the Americano Libre:

Now, [he said,] as there must be provisions in the laws and Treaties of the United States vesting an authority in some of its officers to prevent the equipment of vessels and the enlistment of men in the United States, I make this application to you, most urgently requesting you to take whatever measures may be necessary immediately, *in order to prevent the departure of the above vessel, at least until she shall give bonds that she will not commit hostilities against Spanish subjects. The vessel, it is said, will sail to-morrow morning.* Indeed, if an inquiry were instituted, I am induced to believe the above brig would be found to be a pirate.

In support of this application, two depositions of persons, who stated that attempts had been made to induce them to enlist on board the vessel in question, were sent on that and the following day. Mr. District Attorney Fisk replied, on the 17th September, 1817:

I have duly received your notes of yesterday evening and of this day, and have

referred to the statutes providing for the punishment of the offenses stated. *It is not a case, from the evidence mentioned, that would justify the Collector in detaining the vessel.* The aggression is to be punished in the ordinary mode of prosecuting those who are guilty of misdemeanors. Oath is to be made of the facts by the complainant, who enters into a recognizance to appear and prosecute the offenders before any process can issue. This oath being made and recognizance taken, the Judge of the Circuit Court will issue a warrant to apprehend the accused, and bring them before him, to be further dealt with according to law. When apprehended, it is the province of the Attorney of the United States to conduct the prosecution to judgment. I have no authority to administer an oath, or to issue a warrant, *nor have I the power to issue any process to arrest and detain the vessel in question, unless by the direction of an Executive officer of the United States.* * * * By adverting to the statutes, it will be seen that the vessel is not liable to seizure for the act of any person enlisting himself to go on board, or for hiring or retaining another person to enlist: *the punishment is personal to the offenders.* * * * *It is impracticable for me, or for any other officer of the United States, to take any legal measures against aggressors, upon the indefinite statement of certain persons being concerned in an illegal transaction.* (British Appendix, vol. iii, pp. 119, 120.)

This precedent will, it is trusted, be borne in mind whenever the Arbitrators may have occasion to consider the questions connected with the enlistment of certain men on board the Shenandoah on the night of the departure of that vessel from Melbourne in 1864.

On 30th September, 1820, Mr. Secretary Adams wrote thus to the Portuguese Minister, the Chevalier de Serra:

The judicial power of the United States is, by their Constitution, vested in their Supreme Court and in Tribunals subordinate to the same. The Judges of these Tribunals are amenable to the country by impeachment, and if any Portuguese subject has suffered by the act of any citizen of the United States within their jurisdiction, it is before these Tribunals that the remedy is to be sought and obtained. For any acts of citizens of the United States, committed out of their jurisdiction and beyond their control, the Government of the United States is not responsible. * * *

The Government of the United States have neither countenanced nor permitted any violation of their neutrality by their citizens. They have, *by various and successive acts of legislation*, manifested their constant earnestness to fulfill their duties toward all parties to that war. *They have repressed every intended violation of them which has been brought before their Courts, and substantiated by testimony, conformable to principles recognized by all Tribunals of a similar jurisdiction.* (British Appendix, vol. iii, pp. 157, 158.)

On the 14th May, 1869, Mr. Hoar, Attorney-General of the United States, thus instructed Mr. Smith, District Attorney for Philadelphia:

Whenever complaint is made against any vessel on trustworthy evidence sufficient to establish before a Court of Justice probable cause to believe that such vessel is forfeitable for a violation of the Neutrality Laws, you are instructed to file a libel, and arrest the vessel. (Documents accompanying the Counter Case of the United States, Part iii, p. 743.)

On the 17th May, 1869, Mr. Pierrepoint, District Attorney of New York, wrote to Mr. Attorney-General Hoar with respect to certain vessels called the Memphis and Santiago, accused of a hostile destination against Cuba:

There is no evidence, as yet, on which to detain them. I would suggest that *if the Spanish Minister would instruct the Spanish Consul here to take some pains and collect some evidence* relating to these matters, and bring it to my notice, I shall act with the greatest promptness.

On the 11th May, 1869, Attorney-General Hoar, forwarding this letter to Mr. Secretary Fish, said:

The several District Attorneys are instructed that, *whenever sufficient evidence is made known to them to establish before a Court of Justice probable cause to believe that any vessel is forfeitable for a violation of the neutrality laws*, they are to file a libel and arrest the vessel. (Cuban Correspondence, 1866–'71, presented with the American Counter Case, pp. 58, 59.)

On the same day, Mr. Attorney-General Hoar sent, as general instructions to the United States Marshals, a copy of a letter addressed on the 20th of May to the Marshal for the Southern District of New York, which contained the following passage:

It is not deemed best, at present, to authorize or require you to employ detectives for the special purpose of discovering violations of the provisions of this Act, (the Act of Congress

of 1818;) *but you and your deputies are expected to receive all information that may be offered,* and to be attentive to all matters of suspicion that may come to your knowledge; and, in cases where your action is required, to be vigilant, prompt, and efficient. I will thank you to communicate to me, from time to time, any information that you may deem trustworthy and important.

On the 28th December, 1870, Mr. Fish, Secretary of State, wrote thus to Mr. Roberts, the Spanish Minister:

The undersigned takes the liberty to call the attention of Mr. Roberts to the fact that a District Attorney of the United States is an officer, whose duties are regulated by law, and who, in the absence of executive warrant, *has no right to detain the vessels of American citizens without legal proofs, founded not upon surmises, or upon the antecedent character of a vessel, or upon the belief or conviction of a Consul, but upon proof submitted according to the forms required by law.* (British Counter Case, page 46.)

These extracts are conceived to show that the principles and rules of practice of the Executive authorities of the United States, as to the evidence necessary to constitute "reasonable ground for belief," that any illegal equipment has been made or is being attempted within their jurisdiction, and to call for "diligence" in the use of the preventive powers of their law, have always been, and still are, essentially the same with those on which the Government of Great Britain acted during the transactions which are the subject of the present inquiry.

35. Of the suggestion, that the belief of the consuls of the United States, in British ports, should be treated as sufficient *prima facie* evidence.

After these instances of the practice of the United States in similar cases, it seems hardly necessary to recur to the extraordinary suggestion of Mr. Dudley, adopted in the American Argument, (page 44,) that whenever the American Consul at Liverpool told the British authorities that "he had no doubt" about the character of a particular vessel, they ought to have accepted this as sufficient till the contrary was shown, and not to have thrown the burden of proof upon the persons giving the information; that "the Government ought to investigate it, and not call upon us for proof." It was indeed quite right and proper that the officers of the British Government should investigate every case of which they were so informed for themselves, as well as they were able; and this is what they actually did on all occasions. But the British authorities at Liverpool had too frequent experience of the error and fallacy of Mr. Dudley's conclusions, drawn from the association with particular vessels of firms or persons known or believed to be in the Confederate interest, to make it possible for them, as reasonable men, to act upon Mr. Dudley's charges as sufficient to throw the burden of proof upon the parties accused, even if such a principle had not been opposed both to British and to American law. In August, 1861, the American Consul at Liverpool, through Mr. Adams, denounced the Bermuda as an "armed steamer," which was "believed to be about to be dispatched with a view of making war against the people of the United States," and which was "ostensibly owned by Fraser, Trenholm & Co." (British Appendix, vol. ii, page 133.) Mr. Adams, writing to Mr. Seward on the 30th August, 1861, said: "No stronger case is likely to be made out against any parties than this. The activity of our Consuls, Messrs. Wilding and Davy, furnished me with very exact information of all the circumstances attending the equipment of this vessel, and yet Her Majesty's Government, on being apprised of it, disclaimed all power to interfere." (American Appendix, vol. i, page 518.) The Bermuda, nevertheless, turned out to be an ordinary blockade-runner. In March and April, 1863, a ship called the Phantom, building at Liverpool by W. Miller & Son, for Fraser, Trenholm & Co., and supplied with engines by Fawcett, Preston & Co., at the launch or trial trip, of which Captain Bullock, Mr. Tessier, and Mr. R. Hamilton, &c., were present; and another ship called the Southerner, building at Stockton for Fraser, Tren-

holm & Co., and meant to be commanded by Captain Butcher, were in like manner denounced. Affidavits of the connection of these firms and persons with the ships were furnished; and the accusations were pressed with great pertinacity, even after Mr. Squarey, the legal adviser of Mr. Dudley, at Liverpool, had admitted that (as to the Phantom) there was no case. About the Southerner, Mr. Dudley affirmed, from the beginning, with the utmost positiveness, that "there was no doubt." And yet it turned out that the charges as to both these vessels also were wholly groundless, notwithstanding the interest in them of those firms and persons, whose very names seem to have been supposed by the Consuls of the United States to be sufficient *prima-facie* evidence of a violation of the law. The Phantom proved to be a blockade-runner, and the Southerner to be a passenger-vessel, whose first employment was to carry Turkish pilgrims in the Mediterranean. (British Appendix, vol. ii, pages 167–209.)

36. The preventive efficacy of the American law tried by the test of practical results.

With respect to the value of the suggestions, in the Argument of the United States, that certain parts of their administrative machinery (such as the employment of District Attorneys, and the encouragement offered to informers by the law, which gives them half the forfeitures obtained by their means) are more effective than the practice of Great Britain, under which the Attorney-General is (in England) the only public prosecutor, and no share of any forfeiture under the Foreign-Enlistment Act is given to informers; light may also be derived from the preceding extracts. On these, however, and all similar points, (giving to the authorities of the United States the credit which they claim for using such preventive powers as they possessed in good faith, and with what they deemed due diligence for their intended purposes,) no evidence can be more instructive than that of *practical results*.

Between the years 1815 and 1818, (notwithstanding everything which the Executive of the United States could do to the contrary,) twenty-eight vessels were armed or equipped in, and dispatched from, the ports of the United States, or within their jurisdiction, for privateering against Spain, viz, seven at New Orleans, one at Barrataria in the Gulf of Mexico, two at Charleston, two at Philadelphia, twelve at Baltimore, and four at New York. (See the list furnished by the Spanish Minister, Appendix to British Case, vol. iii, page 132.)

In the years 1816 to 1819, twenty-six ships were armed in and dispatched from Baltimore alone for privateering against Portugal. (Letter from Chevalier de Serra, November 23, 1819. Ibid., page 155.)

In the period between 1816 and 1828, sixty Portuguese vessels were captured or plundered by privateers armed in American ports, and the ships and cargoes appropriated by the captors to their own use. (Letter from Senhor de Figaniere e Morao. Ibid., page 165.)

The Proclamation of President Van Buren, of the 5th of January, 1838, stated that information had been receeived that, "notwithstanding the Proclamation of the Governors of the States of New York and Vermont, exhorting their citizens to refrain from any unlawful acts within the territory of the United States, and notwithstanding the presence of the civil officers of the United States, * * * arms and munitions of war and other supplies have been procured by the (Canadian) insurgents in the United States; that a military force, consisting in part, at least, of citizens of the United States, had been actually organized, had congregated at Navy Island, and were still in arms under the command of a citizen of the United States, and that they were constantly receiving accessions and aid."

On the 10th March, 1838, a temporary Act of Congress was passed to provide for more efficacious action in repressing these outrages than was provided by the Act of 1818.

Nevertheless, on the 21st November, 1838, President Van Buren found it necessary to issue another Proclamation, in which he said that, in disregard of the solemn warning heretofore given to them by the Proclamations issued by the Executive of the General Government, and by some of the Governors of the States, citizens of the United States had combined to disturb the peace of a neighboring and friendly nation; and a "hostile invasion" had "been made by the citizens of the United States in conjunction with Canadians and others," who "are now in arms against the authorities of Canada, in perfect disregard of their own obligations as American citizens, and of the obligations of the Government of their country to foreign nations."

In August, 1849, President Taylor issued a Proclamation, stating that there was "reason to believe that an armed expedition" was "about to be fitted out in the United States with an intention to invade Cuba;" and letters were written on the subject to the District Attorneys in Louisiana and at Philadelphia, Baltimore, and Boston. (Appendix to American Counter Case, pages 646–648.)

On the 7th of May, 1850, Lopez, nevertheless, left Orleans with five hundred men; landed at Cardenas, and, after occupying the town, fled on the approach of the Spanish troops, and returned to the United States.

It appears, from the Appendix to the American Counter Case, that orders were given for his arrest on the 25th of May, 1850, but the result is not mentioned. (Pages 666, 667.)

On the 27th May, 1850, he was arrested, but discharged; and although the Grand Jury brought in a true bill against him on the 21st July, the prosecution was abandoned.

On the 3d August, 1850, he started on a second expedition with four hundred men, and was executed in Cuba on the 11th September. (British Counter Case, pages 36, 37. See also Appendix to American Counter Case, pages 676–686.)

In October, 1853, an expedition against Mexico issued under Walker from San Francisco, and seized the town of La Paz. In May, 1855, a second expedition issued from the same city, under the same adventurer, against Central America. This expedition landed at Realejo, and Walker continued in Central America until May, 1857, when he was conveyed from Rivas in the United States ship of war Saint Mary's. He then made preparations in the United States for a third expedition; and these renewed preparations occasioned the circular of September 18, 1857, urging the District Attorneys and Marshals to use "due diligence" to enforce the Act of 1818. (British Counter Case, page 38.)

In spite of this, Walker again eluded the law on the 11th September, 1857, and sailed from Mobile with three hundred and fifty men. After occupying Fort Castillo in Central America, he was intercepted by Commodore Paulding and brought to the United States. The American Argument mentions this officer as one of those who have been employed "to maintain the domestic order and foreign peace of the Government," (page 70;) presumably on this occasion; but it will be seen, from the Appendix to the American Counter Case, that his conduct was severely censured by the President at the time, (page 612.)

In December, 1858, another expedition started from Mobile in the Susan, but was frustrated by the vessel being wrecked.

In November, 1859, a further expedition was attempted in the Fashion.

In June, 1860, Walker made his last expedition from the United States, and was shot at Truxillo. (British Counter Case, pages 37–40. See also Appendix to American Counter Case, pages 515–518, 612–627, 632–643, 707–709.)

It may be interesting to mention that a correspondence, respecting claims between the Republic of Nicaragua and the United States, has recently been published in the official Gazette of that Republic, in which the Government of Nicaragua desired that, in a proposed adjustment of claims by a Mixed Commission, the claims of Nicaragua for injuries and losses sustained by these "filibustering" expeditions should be taken into consideration. The Government, however, of the United States declined all responsibility, on the ground that they had fulfilled all that could be required of them, either by the laws of the United States or by international law, and declared these claims to be inadmissible.

The British Counter Case gives an account of the open preparations for an attack on Canada continued during the years 1865–'66. The first raid took place from Buffalo and Saint Alban's in June, 1866.

The second raid was from Malone and Saint Alban's, in May, 1870.

The third raid was on the Pembina frontier, in October, 1871.

Expeditions proceeded from the United States, in aid of the Cuban insurgents, in the Grapeshot and Peritt, in May, 1869; and from New Orleans in the Cespedes, or Lilian, in October, 1869. (The latter was stopped at Nassau.)

Another expedition, in the Hornet or Cuba, (the vessel having been previously libeled in the Admiralty Court and bonded in 1870,) landed in Cuba in January, 1871. (British Counter Case, page 45.)

The foregoing narrative is necessarily brief and imperfect; but it shows, besides the systematic privateering practiced, by subjects of the United States, against Spain and Portugal in 1816–'28, (when upward of fifty-four privateers are mentioned as having been armed and dispatched from American ports,) two expeditions against Cuba under Lopez; six expeditions under Walker; three Fenian raids; and three expeditions in aid of the Cuban insurgents. The latter, according to the reports in the American press, would appear to be still continued.

IX.—*General Conclusion: the failure to prevent does not always prove a want of "due diligence."*

37. The general result proves, that many failures to prevent may happen, without want of due diligence, from causes for which Governments cannot be held responsible.

The general result, to which we have been led as well by reason and principle as by experience, is this: that occasional (it may even be frequent) failures to prevent acts contrary to law, and injurious to a friendly State, may nevertheless be entirely consistent with a serious intention and *bona-fide* endeavor, on the part of the Government whose subjects commit such acts within its jurisdiction, to prevent them, and with the use of due diligence for that purpose; that, without timely information and evidence of a legal kind, sufficient and proper to constitute a "reasonable ground of belief," no obligation to use any such diligence arises, and that the Government of a civilized nation cannot be held wanting in due diligence if, having made reasonable provision by law for the prevention of illegal acts of this nature on the part of its citizens, it proceeds to deal with all such cases in a legal course, according to its accustomed methods of civil administration. This is, in fact, the "diligence," and the only diligence which is, in such cases, generally "due" from an independent State to a foreign Government; and from this it follows that accidental and unintentional difficulties or delays,

or even slips and errors, such as are liable to result, in the conduct of public affairs, from the nature of the subordinate instruments by which, and the circumstances under which, civil Government is necessarily carried on, and against which no human foresight can always absolutely provide, ought not in themselves to be regarded as instances or proofs of a want of "due diligence," where good faith and reasonable activity on the part of the Government itself has not been wanting. Least of all can the Government of a free country be held wanting in due diligence, on the ground of errors of judgment, into which a Judge of a Court of Law, in the exercise of a legal jurisdiction properly invoked, may have fallen (as when the Florida was acquitted at Nassau) in the decision of a particular case.

"The United States agree with Her Majesty's Government when it says, as it does in its Counter Case, that it should not be, and they hope it is not, in the power of Her Majesty's Government to instruct a judge, whether in the United Kingdom or in a colony or dependence of the Crown, how to decide a particular case or question. No judge in Her Majesty's dominions should submit to be so instructed; no community, however small, should tolerate it; and no minister, however powerful, should ever think of attempting it." (Argument of the United States, p. 121.)

This being so, if the Government had information and evidence which made it their duty to detain such a ship as the Florida, and to endeavor to prosecute her to condemnation, and if they actually did so, and offered for that purpose proper evidence, they used all the diligence which was due from them. Over the judgment, whether right or erroneous, they had no control; and for it, if erroneous, they have no responsibility.[1]

But the counsel of the United States say that—

"The efforts of the British Case and Counter Case to ascribe to, or apportion among the various departments of national authority, legislative, judicial, and executive, principal or subordinate, the true measure of obligation and responsibility, and of fault or failure, in the premises, *as among themselves*, seem wholly valueless. If the sum of the obligations of Great Britain to the United States was not performed, the nation was in fault, wherever, in the functions of the State or their exercise, the failure in duty arose." (Argument, p. 147.)

The question, whether "the sum of the obligations of Great Britain to the United States" was or was not performed, (which is the point at issue,) seems to be here assumed. A *petitio principii* cannot, of course, be an answer to arguments intended to show that the sum of those national obligations was, in fact, performed. The United States affirm that in the various cases in which they themselves failed to prevent, within their own territory, equipments and expeditions hostile to other States, the sum of their own national obligations was performed; and yet they seem to deny to the Government of Great Britain the benefit of the same equitable principles of judgment.

X.—*Of the burden of proof, according to the Treaty.*

They go further: they seek to invert the whole burden of proof in the present controversy:

38. Attempt of the United States to change generally the *onus probandi* in the present controversy.

The foundation of the obligation of Great Britain to use "due diligence to *prevent*" certain acts and occurrences within its jurisdiction, *as mentioned in the three Rules, is, that those acts and occurrences within its jurisdic-*

[1] The judgment of acquittal, when once pronounced by the Court of Admiralty in favor of the vessel, was conclusive, as a judgment *in rem*, preventing the possibility of her being afterward again seized as forfeited for a breach of the British Foreign-Enlistment Act, except on the ground of some new violation of the law, subsequent to that judgment. This point of law was expressly determined by the Supreme Court of the United States in the case of Gelston *vs.* Hoyt, already mentioned. The effect of judgments *in rem* by courts of admiralty is everywhere recognized by international law.

tion are offenses against international law, and, being injurious to the United States, furnished just occasion for resentment on their part, and for reparation and indemnity by Great Britain, *unless* these offensive acts and occurrences shall be affirmatively shown to have proceeded from conduct and causes for which the Government of Great Britain is not responsible. *But by the law of nations the State is responsible for all offenses committed against international law arising within its jurisdiction*, by which a foreign State suffers injury, *unless the former can clear itself of responsibility by demonstrating its freedom from fault in the premises.* (Page 154.)

And again, at page 154:

The nature of the presumptive relation which the State bears to the offenses and injuries imputed and proved necessarily throws upon it the burden of the exculpatory proof demanded; that is to say, the proof of due diligence on its part to prevent the offenses which, in fact and in spite of its efforts, have been committed within its jurisdiction, and have wrought the injuries complained of.

39. In so doing, they transgress the rules of the Treaty.

In the face of the sixth article of the Treaty, by which Her Majesty expressly declines to assent to the three Rules as a statement of principles of international law which were in force when these claims arose, but agrees that the Arbitrators may apply these rules to the decision of the claims, *upon the footing of an undertaking by Great Britain* to act upon their principles—it is here assumed that all such acts or occurrences within British jurisdiction as are mentioned in the Treaty are to be dealt with by the Arbitrators as *offenses against international law;* notwithstanding the proofs, given in the British Counter Case and the annex (A) thereto, and referred to at the commencement of this paper, that international law never did require a neutral Government to prohibit and prevent the manufacture, sale, and dispatch of unarmed ships of war, by its citizens within its territory, for a belligerent.

In the face of the three Rules themselves, which affirm the obligation of due diligence to prevent, only when there are "reasonable grounds to believe" that some prohibited act has been or is about to be done, the United States decline the burden of establishing, in each or any case, the existence of this preliminary and indispensable condition, *reasonable ground for belief;* and they ask that this should be taken for granted in every case until it is disproved.

40. The law of nations does not justify this attempt.

To justify this disregard of the primary condition of the rules, they appeal to a supposed law of nations, which is said universally to throw the onus of demonstrating its own freedom from "fault in the premises" upon every State whose citizens commit any offense against international law, injurious to a foreign State within its jurisdiction; which principle, as was shown in the early part of this paper, has never been extended to cases (like the present) when the acts in question have been done by individuals or by small numbers of citizens. The United States do not admit themselves to be responsible for all the equipments and hostile expeditions of their citizens against foreign States which they have failed to prevent, under the propositions that "it is presumed that a Sovereign knows what his subjects openly and frequently commit;" that, "as to his power of hindering the evil, this likewise is also presumed unless the want of it be clearly proved." But, if those propositions would not be applicable against the United States, why are they to be applied against Great Britain, to cases much further removed in their nature and circumstances from the terms of the propositions?

41. The decision in the case of the Elizabeth by the Commissioners under the Treaty of 1794 is against it.

It happens that there is a decision of weight, of which the United States long ago had the benefit in a former controversy with Great Britain, under circumstances not very dissimilar in principle, which is directly opposed to this attempt on their part now to alter the burden of proof. The United

States come before the Arbitrators under an agreement of the Queen of Great Britain, by which Her Majesty authorizes the Arbitrators to assume that she had undertaken, when the present claims arose, to act upon the principles set forth in the three Rules, though not admitting them to have been then in force as rules of international law. In 1798, Great Britain came before the Commissioners of Claims under the Treaty of 1794, with an actual undertaking by the United States to use all the means in their power to restore all British prizes brought into ports of the United States, after a certain date, by any vessel illegally armed within their jurisdiction, and with an acknowledgment of their consequent obligation to make compensation for such, if any, of those prizes as they might not have used all the means in their power to restore. The undertaking of Great Britain, now to be assumed by the Arbitrators, is conditional upon the existence of "*reasonable grounds for belief*" of certain facts by the British Government in the case of each of the vessels for which Great Britain is sought to be made responsible. The undertaking of the United States, in 1794, was also dependent upon certain conditions of fact. What was the decision of the Commissioners in the case of the Elizabeth? (British Counter Case, pp. 29, 30, and British Appendix, vol. v, p. 322:)

"From this examination of the letter, which is given to us for a rule, (Mr. Jefferson to Mr. Hammond, 5th September, 1793,) it results that it was the opinion of the President, therein expressed, that it was incumbent on the United States to make restitution of, or compensation for, all such vessels and property belonging to British subjects as should have been, first, captured between the dates of June 5 and August 7 within the line of jurisdictional protection of the United States, or even on the high seas; if, secondly, such captured vessel and property were brought into the ports of the United States; and, thirdly, provided that, in cases of capture on the high seas, this responsibility should be limited to captures made by vessels armed within their ports; and, fourthly, that the obligation of compensation should extend only to captures made before the 7th August, in which the United States had confessedly foreborne to use all the means in their power to procure restitution; and that, with respect to cases of captures made under the first, second, and third circumstances above enumerated, but brought in after the 7th August, the President had determined that all the means in the power of the United States should be used for their restitution, and that compensation would be equally incumbent on the United States in such of these cases (if any such should at any future time occur) where, the United States having decreed restitution, and the captors having opposed or refused to comply with or submit to such decree, the United States should forbear to carry the same into effect by force.

"Such was the promise. In what manner was that promise to be carried into effect? It was not absolute to restore by the hand of power, in all cases where complaint should be made. * * * * * *

"No, the promise was conditional. We will restore in all those cases of complaint *where it shall be established by sufficient testimony that the facts are true which form the basis of our promise*—that is, that the property claimed belongs to British subjects; that it was taken either within the line of jurisdictional protection, or, if on the high seas, then by some vessel illegally armed in our ports; and that the property so taken has been brought within our ports. *By whom were these facts to be proved? According to every principle of reason, justice, or equity, it belongs to him who claims the benefit of a promise to prove that he is the person in whose favor, or under the circumstances in which the promise was intended to operate.*"

XI.—*Special questions remaining to be considered.*

These are the arguments, upon the subject of the diligence generally due by Great Britain to the United States, with reference to the subjects to which the three Rules of the Treaty of Washington relate, and the principles according to which that diligence is to be proved or disproved, which it has been desired by Her Britannic Majesty's Counsel to submit to the Arbitrators. There remain some other special questions, which require separate examination:

42. Special questions remaining to be considered.

1. Whether the diligence due from Great Britain, as to any vessel equipped contrary to the first Rule, extended to the pursuit of the vessel by a naval force after she had passed beyond British jurisdiction?

2. Whether the diligence, so due, extended to an obligation, on the re-entry of any such vessel into a British port, after she had been commissioned by the Confederate States as a public ship of war, to seize and detain her in such port? And,

3. Whether supplies of coal, furnished in British ports to Confederate cruisers, can be regarded as infractions of the second Rule of the Treaty, or as otherwise wrongful against the United States?

XII.—*There existed no duty to pursue ships beyond the limits of British jurisdiction.*

43. As to the alleged duty of pursuit: The Terceira expedition.

Upon the first of these three points, the sole argument of the United States appears to be derived from the precedent of the Terceira expedition in 1829. It is a strange proposition, and one unsupported by any principle or authority in international law, that, because a Government, which conceived its neutrality laws to have been infringed upon a particular occasion, may have thought fit to visit that offense by extraordinary measures (really in the nature of war or reprisals) beyond its own territory, therefore it placed itself under an obligation to take similar measures upon subsequent occasions, if any such should occur of a like character. In point of fact, there is no similarity between the Terceira case, which (in the view taken of it by the British Government) was an expedition of embodied, t ough unarmed troops, proceeding in transports from Great Britain, against an express prohibition of the British Government, for the invasion of a friendly territory, and the departure of unarmed vessels, for the use of the Confederates, from British ports. In point of international law, the British Government was not only under no obligation to pursue the Terceira expedition, but Sir Robert Phillimore (whose authority is so much extolled in the Argument of the United States) distinctly condemns that proceeding. "The Government," he says, "were supported by a majority in both Houses of Parliament; but in the protest of the House of Lords, and in the resolutions of (*i. e.*, moved in) the House of Commons, (which condemned the proceedings of the Government,) the true principles of international law are found." (Commentaries, vol. iii, p. 235.)

The two remaining points are those on which the Arbitrators have consented to receive arguments, embracing other important questions, both of international law, and as to the proper interpretation of the rules of the Treaty of Washington, in addition to the question of the diligence (if any) due from Great Britain to the United States, in those respects.

CHAPTER II.—ON THE SPECIAL QUESTION OF THE EFFECT OF THE COMMISSIONS OF THE CONFEDERATE SHIPS OF WAR, ON THEIR ENTRANCE INTO BRITISH PORTS.

1. The true construction of the 1st rule of the Treaty.

It is contended by the United States that these ships (or at least such of them as had been illegally equipped in British territory) ought to have been seized and detained, when they came into British ports, by the British authorities. This argu-

ment depends upon a forced construction of the concluding words of the first Rule, in Article VI of the Treaty of Washington; which calls upon the neutral State to "use due diligence to *prevent the departure from its jurisdiction* of any vessel *intended* to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use." Does this Rule authorize the Arbitrators to treat it as a duty undertaken by Great Britain, to seize Confederate cruisers commissioned as public ships of war and entering British ports in that character, without notice that they would not be received on the same terms as other public ships of war of a belligerent State, if they were believed to have been "specially adapted, in whole or in part, within British jurisdiction, to warlike use?" The negative answer to this inquiry results immediately from the natural meaning of the words of the Rule itself, which plainly refer to a departure from the neutral territory of a vessel which has not at the time of such departure ceased to be *subject*, according to the law of nations, to *the neutral jurisdiction;* and the cruising and carrying on war by which still rests in *intention and purpose only*, and has not become an accomplished fact, under the public authority of any belligerent Power.

2. The privileges of public ships of war in neutral ports.

If a public ship of war of a belligerent Power should enter neutral waters in contravention of any positive regulation or prohibition of the neutral Sovereign, of which due notice had been given, she might, according to the law of nations, be treated as guilty of a hostile act, a violation of neutral territory; and hostile acts may of course be justifiably repelled by force. But the original equipment and dispatch from neutral territory of the same ship, when unarmed, whether lawful or unlawful, was no hostile act; and a foreign Power, which afterward receives such a ship into the public establishment of its navy, and gives her a new character by a public commission, cannot be called upon to litigate with the neutral Sovereign any question of the municipal law of the neutral State, to whose jurisdiction it is in no matter subject. The neutral State may, if it think fit, give notice (though no authority can be produced for the proposition that it is under any international obligation to do so) that it will not allow the entrance of a particular description of vessels, whether commissioned or not, into its waters; if it gives no such notice it has no right, by the law of nations, to assume or exercise any jurisdiction whatever over any ship of war coming into its waters under the flag and public commission of a recognized belligerent.[1] Such a ship, committing no breach of neutrality while within neutral waters, is entitled to extra-territorial privileges; no court of justice of the neutral country can assume jurisdiction over her; the flag and commission of the belligerent power are conclusive evidence of his title and right; no inquiry can be made, under such circumstances, into anything connected with her antecedent ownership, character, or history. Such was the decision (in accordance with well-established principles of international law) of the highest judicial authority in the United States in 1811, in the case of the Exchange, a ship claimed by American citizens, in American waters, as their own property; but which, as she had come in as a public ship of war of France, under the commission of the first Emperor Napoleon, was held to be entitled to recognition as such in the waters of the United States, to the entire exclusion of every proceeding

[1] The proceedings of the British Government, in the case of the Tuscaloosa, turned entirely upon the question whether she was, or was not, a *prize*, whose entrance into a British port was prohibited by the rules publicly issued by the Queen at the beginning of the war.

and inquiry whatever, which might tend in any way to deprive her of the benefit of that privileged character. The principles laid down in the following extracts from that judgment are in accordance with those which will be found in every authoritative work on international law which treats of the subject; (see the passages from Ortolan, Hautefeuille, Pando, &c., cited at length in the note to the British Counter Case, pp. 14, 15; also Azuni, vol. ii, (Paris edition, 1805,) pp. 314, 315, &c.; and Bluntschli's "Droit international," Article 321, p. 184 of the French translation by Lardi:)

3. The case of the Exchange.

The world being composed of distinct sovereignties, possessing equal rights and equal independence, whose mutual benefit is promoted by intercourse with each other, and by an interchange of those good offices which humanity dictates and its wants require, all Sovereigns have consented to a relaxation in practice, in cases under certain peculiar circumstances, of that absolute and complete jurisdiction within their respective territories which sovereignty confers.

This consent may, in some instances, be tested by common usage and by common opinion growing out of that usage.

A nation would justly be considered as *violating its faith*, although that faith might not be expressly plighted, which should suddenly, and without previous notice, exercise its territorial powers in a manner not consonant to the usages and received obligations of the civilized world.

This full and absolute territorial jurisdiction being alike the attribute of every Sovereign, and being incapable of conferring extra-territorial power, would not seem to contemplate foreign Sovereigns nor their sovereign rights as its objects. One Sovereign being in no respect amenable to another, and being bound by obligations of the highest character not to degrade the dignity of his nation, by placing himself or its sovereign rights within the jurisdiction of another, can be supposed to enter a foreign territory only under an express license, or in the confidence that the immunities belonging to his independent sovereign station, though not expressly stipulated, are reserved by implication, and will be extended to him.

This perfect equality and absolute independence of Sovereigns, and this common interest impelling them to mutual intercourse and an interchange of good offices with each other, have given rise to a class of cases in which every Sovereign is understood to waive the exercise of a part of that complete exclusive territorial jurisdiction which has been stated to be the attribute of every nation.

If, for reasons of state, the ports of a nation generally, or any particular ports, be closed against vessels of war generally, or the vessels of any particular nation, notice is usually given of such determination. If there be no prohibition, the ports of a friendly nation are considered as open to the public ships of all powers with whom it is at peace, *and they are supposed to enter such ports, and to remain in them, while allowed to remain, under the protection of the Government of the place.*

When private individuals of one nation spread themselves through another as business or caprice may direct, mingling indiscriminately with the inhabitants of that other, or when merchant-vessels enter for the purposes of trade, it would be obviously inconvenient and dangerous to society, and would subject the laws to continual infraction and the Government to degradation, if such individuals or merchants did not owe temporary and local allegiance, and were not amenable to the jurisdiction of the country. Nor can the foreign Sovereign have any motive for wishing such exemption. His subjects thus passing into foreign countries are not employed by him, nor are they engaged in national pursuits. Consequently, there are powerful motives for not exempting persons of this description from the jurisdiction of the country in which they are found, and no one motive for requiring it. The implied license, therefore, under which they enter can never be construed to grant such exemption.

But in all respects different is the situation of a public armed ship. She constitutes a part of the military force of her nation; acts under the immediate and direct command of the Sovereign; is employed by him in national objects. He has many and powerful motives for preventing those objects from being defeated by the interference of a foreign State. Such interference cannot take place without affecting his power and his dignity. The implied license, therefore, under which such vessel enters a friendly port may reasonably be construed, and it seems to the court ought to be construed, as containing *an exemption from the jurisdiction of the Sovereign* within whose territory she claims the rights of hospitality.

Upon these principles, by the unanimous consent of nations, a foreigner is amenable to the laws of the place; but certainly, in practice, *nations have not yet asserted their jurisdiction* over the public armed ships of a foreign Sovereign entering a port open for their reception.

4. Other authorities.

The words of Bluntschili are:

Exceptionellement on accorde l'exterritorialité aux navires de

guerre étrangers, lorsqu'ils sont entrés dans les eaux d'un état avec la permission de ce dernier.

Mr. Cushing, when Attorney-General of the United States, in 1855, thus stated the rule, as received in the United States:

A foreign ship of war, or any prize of hers in command of a public officer, possesses, in the ports of the United States, the right of exterritoriality, and is not subject to the local jurisdiction.[1]

5. The rule cannot require an act wrongful by international law.

It cannot, therefore, be supposed that when two nations, by both of which these principles of international law had been habitually acted on, recognized, in the first Rule of the Treaty of Washington, an obligation to "*use due diligence to prevent the departure of a ship intended to cruise*," &c., from the "*neutral jurisdiction*," either of them meant to authorize the other to demand, under any circumstances, a violation of these principles, in the case of any ship cruising as a ship of war by the public authority of a belligerent at the time of her entrance into neutral waters, and which, according to these principles, was there entitled to the privilege of exterritoriality, and was not subject to the neutral jurisdiction. Had an innovation of so important and extraordinary a kind been intended, it would certainly have been unequivocally expressed; and it would have become the plain duty of any neutral State, which had entered into such an engagement, to give notice of it beforehand to all belligerent Powers before it could be put in force to their prejudice. It is impossible that an act which would be a breach of public faith and of international law toward one belligerent could be held to constitute any part of the "*diligence due*" by a neutral to the other belligerent. The rule says nothing of any obligation to *exclude* this class of vessels, when once commissioned as public ships of war, from entrance into neutral ports upon the ordinary footing. If they were so excluded by proper notice they would not enter, and the rule (in that case) could never operate to prevent their departure. If they were not so excluded, instead of being "due diligence," it would be a flagrant act of treachery and wrong to take advantage of their entrance in order to effect their detention or capture. Can Her Majesty be supposed to have consented to be retrospectively judged, as wanting in due diligence, because, not having excluded these Confederate ships of war from her ports by any prohibition or notice, she did not break faith with them, and commit an outrage on every principle of justice and neutrality by their seizure? The rules themselves had no existence at the time of the war; the Confederates knew, and could know, nothing of them; their retrospective application cannot make an act *ex post facto* "due," upon the footing of "diligence," to the one party in the war, which, if it had been actually done, would have been a wholly unjustifiable outrage against the other.

These principles receive illustration from the controversy which took place in December, 1861, between Brazil and the United States, on the subject of the reception of the Sumter in Brazilian ports. Señor Taques, the Foreign Minister of Brazil, wrote thus to Mr. Webb, the United States Minister at Rio, on the 9th December, 1861:

Some Powers have adopted as a rule not to admit to entry in their ports either the privateers or vessels of war of belligerents; others are holden to do so under the obligations of treaties concluded with some of the belligerents before or during the war.

[1] It has been the practice of the United States to restore prizes, when brought into their ports, if made by ships illegally equipped in their territory, on proof of such illegal equipment in their courts of law; all the world having notice of their rule and practice in this respect. It has not been their rule or practice to seize or detain, on the ground of any such illegal equipment, ships afterward commissioned, and coming into their ports as public ships of war of a recognized belligerent Power.

Brazil has never placed herself in this exceptional condition, but, under the general rule, which admits to the hospitality of her ports ships of war, and even to a privateer compelled by stress to seek it, provided she brings no prizes, nor makes use of her position in such ports for acts of hostility by taking them as the basis for her operations.

The rule adopted by civilized nations is to detain in port vessels equipped for war until twenty-four hours after the departure of any hostile vessel, or let them go, requiring from the commanders of vessels of war their word of honor, and from privateers pecuniary security and promise, that they will not pursue vessels which had left port within less than twenty-four hours before them. Nor do the rules of the law of nations nor usage, nor the jurisprudence which results from treaties, authorize a neutral to detain longer than twenty-four hours in his ports vessels of war or privateers of belligerents, unless it could be done by the indirect means of denying them facilities for obtaining in the market the victuals and ship's provisions necessary to the continuance of their voyages. *A neutral who should act in this manner, incarcerating in his ports the vessels of one of the parties, would take from one of the belligerents the exercise of his rights, turn himself by the act into an ally and co-operator with the other belligerent, and would violate his neutrality.*

Without a previous declaration, before the principles adopted in Brazil and in the United States being known, such a proceeding on the part of the Brazilian authorities toward the Sumter would take the character of a snare, which would not meet the esteem or approval of any Government.[1]

6. There is no rule obliging a neutral to exclude from his ports foreign ships of this description.

The absence of any rule obliging a neutral to *exclude* from his ports foreign ships of war, if originally adapted, wholly or in part, to warlike use within the neutral jurisdiction, rests evidently upon good reasons, and cannot have been unintentional. Whatever, as a matter of its own independent discretion and policy, a neutral Government may, at any time, think fit to do in such cases, it will certainly do with all public and proper notice, which cannot be retrospectively assumed to have been given, or agreed to be given, contrary to notorious facts. The reasons, which in some cases might make a policy of this kind just and reasonable, as against a Power which, first infringing the laws of a neutral State by procuring vessels to be illegally equipped within its territory, might afterward employ them in war, would not apply to other cases, which may easily be supposed; *e. g.*, if such a vessel, having been disposed of to new owners after her first equipment, were afterward commissioned by a Power not in any sense responsible for that equipment. The offense is one of persons, not of things; it does not adhere necessarily to the ship into whatever hands she may come; even a ship employed by pirates in their piracy, if she is afterward (before seizure in the exercise of any lawful jurisdiction) actually transferred to innocent purchasers, ceases to have the taint of piracy in the hands of such new owners, as was lately decided by the Judicial Committee of the English Privy Council in the case of the Dominican ship Telegrafo. Nor, in a question of this kind between Great Britain and the Confederate States, is it possible to assume (in view of the facts that the interpretation of the British prohibitive law was disputed and doubtful, and that international law had never treated the construction, equipment, and dispatch of unarmed ships of war by neutral shipbuilders, to the order of a belligerent, as a violation of the territory or sovereignty of the neutral State) that the authorities of the Confederate States, when they commissioned the vessels in question, were actually in the situation of a Power which had willfully infringed British law, or British neutrality, within British territory.

7. In any view the latter part of Rule 1 cannot apply to the Georgia or the Shenandoah.

Even if the latter part of the first Rule could be construed as the United States suggest, with respect to the subject of the present chapter, it would not apply to the Georgia—a ship whose special adaptation, within British jurisdiction, to warlike use, the Tribunal is asked to take for granted without

[1] British App., vol. vi, p. 14.

any evidence, though it is denied by Great Britain, and though the ship actually proved to be unsuitable for such use. Still less could the Rule apply to the Shenandoah, a merchant-ship, transferred to the Confederates, without receiving, within British jurisdiction, any new equipment or outfit whatever, of any kind, in order to enable her to cruise or to be employed in the Confederate service. It is clear, beyond controversy, that when the Shenandoah entered the port of Melbourne as a public ship of war of the Confederates, nothing had been done to her, in any part of the British dominions, which could be so much as pretended to be an infringement of the first Rule of the Treaty, or of the law of nations, or of any British law whatever. And yet, in the Argument of the United States (pp. 120, 121) a statement by the United States Consul at Melbourne, in a letter to Mr. Seward, to the effect, that, in some conversation with him, the Colonial Law-Officers had "*seemed to admit* that she was liable to seizure and condemnation if found in British waters," is gravely brought forward and seriously commented on, as a reason why she ought to have been seized at Melbourne.

The Argument of the United States suggests, however, a distinction between "public ships of recognized nations and Sovereigns" and "public ships belonging to a belligerent Power which is *not a recognized State.*" For such a distinction there is neither principle nor authority. The passage cited in the British Summary (p. 31) from the judgment of Mr. Justice Story, in the case of the Santissima Trinidad, states the true principles applicable to this part of the subject. The ship Independencia del Sud, whose character was there in controversy, had been commissioned by the revolutionary Government of Buenos Ayres:

8. The distinction suggested by the United States between ships of war of recognised nations and ships of a non-recognized State.

"There is another objection," said the learned Judge, "urged against the admission of this vessel to the privileges and immunities of a public ship, which may well be disposed of in connection with the question already considered. It is, that Buenos Ayres has not yet been acknowledged as a sovereign independent Government by the Executive or Legislature of the United States, and, therefore, is not entitled to have her ships of war recognized by our Courts as national ships. We have, in former cases, had occasion to express our opinion on this point. The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed a determination to remain neutral between the parties, and to allow to each the same right of asylum and hospitality and intercourse. *Each party is, therefore, deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war,* and entitled to be respected in the exercise of those rights. We cannot interfere, to the prejudice of either belligerent, without making ourselves a party to the contest, and departing from the posture of neutrality. All captures made by each must be considered as having the same validity; *and all the immunities which may be claimed by public ships in our ports under the law of nations must be considered as equally the right of each.*"

In like manner, in the recent case of the Hiawatha, (a British prize, taken by the United States at the commencement of the late civil war,) when the question arose, whether the civil contest in America had the proper legal character of war, *justum bellum*, or that of a mere domestic revolt, and was decided by the majority of the Supreme Court of the United States in accordance with the former view, Mr. Justice Grier, delivering the opinion of the majority, said:

It is not the less a civil war with belligerent parties in hostile array because it may be called an "insurrection" by one side, and the insurgents be considered as rebels or traitors. It is not necessary that the independence of the revolted province or State be acknowledged, in order to constitute it a party-belligerent in a war, according to the law of nations. Foreign nations acknowledge it as war by a declaration of neutrality. The condition of neutrality cannot exist unless there be two belligerent parties. In the case of the Santissima Trinidad (7 Wheaton, 337) this court says: "The Government of the United States has recognized the existence of a civil war between Spain and her colonies, and has avowed her determination to remain neutral

between the parties. Each party is therefore deemed by us a belligerent nation, having, so far as concerns us, the sovereign rights of war."

Professor Bluntschli, in a contribution to the "Revue de droit international" for 1870, (pp. 452–470,) in which, upon the assumptions of fact contained in a speech of Mr. Summer in the Senate of the United States, (and on those assumptions only,) he favors some part of the claims of the United States against Great Britain, so far as relates to the particular ship Alabama, distinctly lays down the same doctrine:

Du reste, le parti révolté, qui opère avec des corps d'armée militairement organisés, et entreprend de faire triompher par la guerre un programme politique, agit, alors même qu'il ne forme point un état, tout au moins comme s'il en constituait un, au lieu et place d'un état ("an Staates statt"). Il affirme la justice de sa cause, et la légitimité de sa mission, *avec une bonne foi égale à celle qui se présume de droit chez tout état belligérant.* (Pages 455–456.)

Again:

Pendant la guerre on admet, dans l'intérêt de l'humanité, *que les deux parties agissent de bonne foi* pour la défense de leurs prétendus droits. (Page 453.)

And, at pages 461, 462:

Si l'on tient compte de toutes ces considérations, on arrive à la conclusion suivante; états européens, en présence de la situation que créaient les faits, la lutte engagé C'est que, à considérer d'un point de vue impartial, tel qu'il s'offrait et s'imposait aux entre l'union et la confédération, c'est-à-dire, entre le ford et le sud, il était absolument impossible de ne pas admettre que les états-Unis fussent alors engagés dans une grande guerre civile, ou les deux partis avaient le caractère de puissances politiquement et militairement organisées, se faisant l'une à l'autre la guerre, suivant le mode que le droit des gens reconnaît comme régulier, et animés d'une égale confiance dans le bon droit. * * * *Tout le monde était d'accord qu'il y avait guerre, et que, dans cette guerre, il y avait deux parties belligérantes.*

9. All the ships in question were duly commissioned ships of war.

That all the vessels of which there is any question before the Arbitrators, and especially those which are alleged to have been equipped or adapted for warlike uses within British territory, were, in fact, commissioned and employed as public ships of war by the authorities then exercising the powers of public Government in the Confederate States, is not seriously (if it be at all) disputed by the United States. The proofs of it[1] abound both elsewhere and in those intercepted letters from Confederate authorities, and other Confederate documents, (such as the Journal of Captain Semmes, &c.,) which the United States have made part of their evidence; and to which, for this purpose at all events, they cannot ask the Arbitrators to refuse credit. All these vessels were always received as public ships of war in the ports of France, Spain, the Netherlands, Brazil, and other countries.

"As to the Florida," said the Marquis d'Abrantes, the Foreign Minster of Brazil, writing to Mr. Webb on the 22d June, 1863, "the undersigned must begin by asking Mr. Webb's consent to observe that if the President of Pernambuco knew that that steamer was the consort of the Alabama, as was also the Georgia, it does not follow, as Mr. Webb otherwise argues, that the said President should consider the Florida as a pirate.

"According to the principles of the neutrality of the Empire, to which the undersigned has already alluded, all these vessels of the Confederate States are vessels of war, exhibiting the flag and bearing the commission of the said States, by which the Imperial Government recognized them in the character of belligerents."[2]

Upon the same footing the Shenandoah was delivered up to the United States, as public property, when she arrived at Liverpool after

[1] See Appendix to Case of the United States, vol. ii, pp. 486, 487, (Sumter;) ibid., pp. 550, 551, (Nashville;) ibid., pp. 614, 633, and vol. i, p. 543, (Florida;) vol. vi, p. 486, (Alabama;) vol. ii, pp. 673, 680, 713, (Georgia;) vol. iii, p. 332, &c., (Shenandoah;) also Mr. Benjamin's instructions, vol. i, pp. 621, 624.

[2] British App., vol. vi, pp. 59, 60.

the conclusion of the war. And though the terms "pirates" and "privateers" have been freely applied to these vessels in many of the public and other documents of the United States, the former term was only used as a vituperative or argumentative expression, in aid of the objections of the United States to the recognition, by foreign Powers, of the belligerent character of the Confederates. Neither Captain Semmes, of the Alabama, nor any other officer or seaman engaged in the naval service of the Confederates, was ever, during the war or after its conclusion, actually treated as a pirate by any political or other authority of the United States. And with respect to the denomination of "privateer," a privateer is a vessel employed by private persons, under letters of marque from a belligerent Power, to make captures at sea for their private benefit. None of the vessels in question, at any moment of their history, can be pretended to have had that character.

CHAPTER III.—ON THE SPECIAL QUESTION OF SUPPLIES OF COAL TO CONFEDERATE VESSELS IN BRITISH PORTS.

The next point which remains is that as to the supplies of coal in British ports to Confederate cruisers.

That such supplies were afforded equally and impartially, so far as the regulations of the British Government and the intentions and voluntary acts of the British colonial authorities are concerned, to both the contending parties in the war, and were obtained, upon the whole, very much more largely by the ships of war of the United States than by the Confederate cruisers, are facts which ought surely to be held conclusive against any argument of the United States against Great Britain founded on these supplies. That such arguments should be used at all can hardly be explained, unless by the circumstance that they are found in documents maintaining the propositions that the belligerent character of the Confederates ought never to have been recognized, and that impartial neutrality was itself, in this case, wrongful. Let those propositions be rejected, and their own repeated acts in taking advantage of such supplies (sometimes largely in excess of the limited quantities allowed by the British regulations) are conclusive proof that the United States never, during the war, held or acted upon the opinion that a neutral State, allowing coal to be obtained by the war-vessels of a belligerent in its ports, whether with or without any limitation of quantity, was guilty of a breach of neutrality or of any obligation of international law.

1. Both parties in the war equally received such supplies.

That such supplies might be given, consistently with every hitherto recognized rule or principle of international law is abundantly clear.

Chancellor Kent, in his commentaries, first lays down the rule against using neutral territory as a base of warlike operations, as that rule had been understood and acted upon, both in Great Britain and in America:

2. Such supplies are not within the rule as to not using neutral territory as a base of operations.

It is a violation of neutral territory for a belligerent ship to take her station within it, in order to carry on hostile expeditions from thence, or to send her boats to capture vessels being beyond it. No use of neutral territory, for the purpose of war, can be permitted. This is the doctrine of the Government of the United States. It was declared judicially in England, in the case of the Twee Gebroeders; and, though it was not understood that the prohibitions extended to remote objects and uses, such as procuring provisions and other innocent articles, which the law of nations tolerated, yet it was explicitly declared that *no proximate acts of war were in any manner to be allowed*

to originate on neutral ground. No act of hostility is to be commenced on neutral ground. No measure is to be taken that will lead to immediate violence. (Vol. i, page 118.)

At page 120 he says:

There is no exception to the rule, that every voluntary entrance into neutral territory, with hostile purposes, is absolutely unlawful. The neutral border must not be used as a shelter for making preparations to renew the attack; and, though the neutral is not obliged to refuse a passage and safety to the pursuing party, he ought to cause him to depart as soon as possible, and not permit him to lie by and watch his opportunity for further contest. This would be making the neutral country directly auxiliary to the war, and to the comfort and support of one party."[1]

Ortolan (Diplomatie de la Mer, vol. ii, p. 291) says:

Le principe général de l'inviolabilité du territoire neutre exige aussi que l'emploi de ce territoire reste franc de toute mesure ou moyen de guerre, de l'un des belligérants contre l'autre. C'est une obligation pour chacun des belligérants de s'en abstenir; c'est aussi un devoir pour l'État neutre d'exiger cette abstention; et c'est aussi pour lui un devoir d'y veiller et d'en maintenir l'observation à l'encontre de qui que ce soit. Ainsi il appartient à l'autorité qui commande dans les lieux neutres où des navires belligérants, soit de guerre, soit de commerce, ont été reçus, de prendre les mesures nécessaires pour que l'asile accordé ne tourne pas en machination hostile contre l'un des belligérants; pour empêcher spécialement qu'il ne devienne un lieu d'où les bâtiments de guerre ou les corsaires surveillent les navires ennemis pour les poursuivre et les combattre, et les capturer lorsqu'ils seront parvenus au-delà de la mer territoriale. Une de ces mesures consiste à empêcher la sortie simultanée des navires appartenant à des Puissances ennemies l'une de l'autre.

Again, at page 302:

Si des forces navales belligérantes sont stationnées dans une baie, dans un fleuve, ou à l'embouchure d'un fleuve, d'un État neutre, a dessein de profiter de cette station pour exercer les droits de la guerre, les captures faites par ces forces navales sont aussi illégales. Ainsi, si un navire belligérant mouillé ou croisant dans les eaux neutres capture, au moyen de ses embarcations, un bâtiment qui se trouve en dehors des limites de ces eaux, ce bâtiment n'est pas de bonne prise: bien que l'emploi de la force n'ait pas eu lieu dans ce cas, sur le territoire neutre, néanmoins il est le résultat de l'usage de ce territoire; et un tel usage pour des desseins hostiles n'est pas permis.[2]

3. What is meant by the words "A base of naval operations."

The above passages supply the obvious and sufficient explanation of the words "base of naval operations." Neutral territory is not to be used "in order to carry on hostile operations from thence," or "as a shelter for making preparations for attack;" (Kent.) No act of hostility is to commence or originate there. "Captures made by armed vessels stationed in a river of a neutral Power, or in the mouth of his rivers, or in harbors, *for the purpose of exercising the rights of war from that river or harbor*, are invalid;" (Phillimore.) It is not to be made a place "d'où les bâtiments de guerre surveillent les navires ennemis pour les poursuivre et les combattre et les capturer, lorsqu'ils sont parvenus au delà de la mer territoriale;" (Ortolan.)

It is not to "servir de station aux bâtiments des Puissances belligérantes;" (Heffter.) It is not to "servir à tendre des embûches à l'un des belligérants;" (Hautefeuille.) Belligerent vessels are not to station themselves or to cruise within it, in order to look out for enemies' ships, "encore qu'ils sortent de leur retraite pour aller les attaquer hors les limites de la juridiction neutre." (Ibid., and Pistoye et Duverdy.)

The phrase now in question is a short expression of the principle that neutral territory is not to be used as a place from which operations of naval warfare are to be carried into effect; whether by single ships, or by ships combined in expeditions. It expresses an accepted rule of international law. Any jurist who might have been asked whether neutral ports or waters might be used as a base for naval operations, would have

[1] See also Wheaton's "Elements," (Lawrence's edition,) p. 720; Phillimore, vol. ii, p. 452.

[2] See also Heffter, (Bergson,) pp. 275, 276, 279; and Hautefeuille, vol. ii, p. 82; Calvo, "Derecho Internacional," ii; Pistoye et Duverdy, vol. i, p. 108.

replied that they might not; and he would have understood the words in the sense stated above.

The above citations and references furnish at the same time the necessary limitations under which the phrase is to be understood. None of these writers question—no writer of authority has ever questioned—that a belligerent cruiser might lawfully enter a neutral port, remain there, supply herself with provisions and other necessaries, repair damages sustained from wear and tear, or in battle, replace (if a sailing-ship) her sails and rigging, renew (if a steamer) her stock of fuel, or repair her engines, repair both her steaming and her sailing power, if capable (as almost all ships of war now are) of navigating under sail and under steam, and then issue forth to continue her cruise, or (like the Alabama at Cherbourg) to attack an enemy. "Ils y sont admis à s'y procurer les vivres nécessaires et à y faire les réparations indispensables pour reprendre la mer *et se livrer de nouveau aux opérations de la guerre ;*" (Ortolan; Heffter.) "Puis sortir librement pour aller livrer de nouveaux combats;" (Hautefeuille.) The connection between the act done within the neutral territory and the hostile operation which is actually performed out of it, must (to be within the prohibition) be "proximate;" that is, they must be connected directly and immediately with one another. In a case where a cruiser uses a neutral port to lie in wait for an enemy, or as a station from whence she may seize upon passing ships, the connection is proximate. But where a cruiser has obtained provisions, sail-cloth, fuel, a new mast, or a new boiler-plate in the neutral port, the connection between this and any subsequent capture she may make, is not "proximate," but (in the words of Lord Stowell, quoted by Kent, Wheaton, and other writers) "remote." The latter transaction is "universally tolerated;" the other universally forbidden.

4. What is not meant by those words.

It is evident that if this phrase, "base of operations," were to be taken in the wide and loose sense now contended for by the United States, it might be made to comprehend almost every possible case in which a belligerent cruiser had taken advantage of the ordinary hospitalities of a neutral port. It would be in the power of any belligerent to extend it almost indefinitely, so as to fasten unexpected liabilities on the neutral.

5. Consequences of a lax use of the phrase "base of operations."

Does it, then, make any difference that, in the second Rule of the Treaty of Washington, the prohibition of the use of neutral ports or waters as "the base of naval operations," by one belligerent against the other, is combined with the further prohibition of "the renewal or augmentation of military supplies or arms?" So far from this, the context only makes the meaning of the former part of the Rule more clear. There can be no reasonable doubt as to what is meant by the words "renewal or augmentation of military supplies or arms."

6. Effect of the addition of the words "renewal or augmentation of military supplies or arms."

At page 122 of his Commentaries, (vol. i,) Chancellor Kent says:

7. Doctrine of Chancellor Kent.

> The Government of the United States was warranted by the law and practice of nations, in the declarations made in 1793 of the rules of neutrality, which were particularly recognized as necessary to be observed by the belligerent Powers in their intercourse with this country. These rules were, that the original arming or equipping of vessels in our ports by any of the Powers at war for military service was unlawful, and no such vessel was entitled to an asylum in our ports. The equipment by them of Government vessels of war in matters which, if done to other vessels, would be applicable equally to commerce or war, was lawful. The equipment by them of vessels fitted for merchandise and war, and applicable to either, was lawful; but, if it were of a nature solely applicable to war, was unlawful.

The Rules of President Washington (August 4, 1793) speak for themselves. Some of them (as the 6th) clearly exceeded any obligation previously incumbent upon the United States by international law.

8. President Washington's Rules of 1793, and other authorities.

They were as follows:

1. The *original arming and equipping* of vessels in the ports of the United States by any of the belligerent parties for military service, offensive or defensive, is deemed unlawful.

2. Equipments of merchant-vessels by either of the belligerent parties in the ports of the United States, purely for the accommodation of them as such, is deemed lawful.

3. *Equipments in the ports of the United States of vessels of war in the immediate service of the Government of any of the belligerent parties, which, if done to other vessels, would be of a doubtful nature, as being applicable either to commerce or war, are deemed lawful;* except those which shall have made prize of the subjects, people, or property of France, coming with their prizes into the ports of the United States, pursuant to the seventeenth Article of our Treaty of Commerce with France.

4. *Equipments in the ports of the United States,* by any of the parties at war with France, *of vessels fitted for merchandise and war, whether with or without commissions, which are doubtful in their nature as being applicable either to commerce or war, are deemed lawful,* except those which shall have made prize, &c., (as before.)

5. *Equipments of any of the vessels of France,* in the ports of the United States, *which are doubtful in their nature, as being applicable to commerce or war, are deemed lawful.*

6. Equipments of every kind in the ports of the United States of privateers of the Powers at war with France are deemed unlawful.

7. *Equipments of vessels in the ports of the United States which are of a nature solely adapted to war, are deemed unlawful,* except those stranded or wrecked, as mentioned in the eighteenth Article of our Treaty with France, the sixteenth of our Treaty with the United Netherlands, the eighteenth of our Treaty with Prussia.

8. Vessels of either of the parties not armed, or armed previous to their coming into the ports of the United States, which shall not have infringed any of the foregoing rules, may lawfully engage or enlist their own subjects or citizens, not being inhabitants of the United States, except privateers of the Powers at war with France, and except those vessels which have made prizes, &c.

(Appendix to Report of Neutrality Laws Commission, page 23; British Appendix, vol. iii.)

There can be no question that under these principles and Rules, any amount whatever of coaling by a war-steamer of a belligerent Power in a neutral port was perfectly lawful.

Similar principles will be found in all the best authorities of international law, applicable to the asylum and hospitality which the ships of war of a belligerent may receive in neutral ports without a violation of neutrality. Some of those authorities are referred to in the note at foot of this page.[1]

In accordance with these principles, the Acts of Congress of 1794 and 1818 prohibited, in section 4 of the former, and section 5 of the latter Act, the "increase or augmentation of the force of any ship of war, cruiser, or other armed vessel which, at the time of her arrival within the United States, was a ship of war, cruiser, or armed vessel in the service of any foreign Prince, &c., *by adding to the number of the guns of such vessel, or by changing those on board of her for guns of larger caliber, or by the addition thereto of any equipment solely applicable to war.*"

9. Acts of Congress of 1794 and 1818.

In like manner the British Foreign-Enlistment Act of 1819, by section 8, prohibited the "increase or augmentation of the warlike force of any ship or vessel of war, or cruiser, or other armed vessel, which, at the time of her arrival in any part of the

10. British Foreign-Enlistment Act of 1819.

[1] Ortolan, "Règles Internationales et Diplomatie de la Mer," (4th edition,) vol. ii, p. 286; Heffter, "Droit International," (Bergson's translation,) § 149, and note (2) on p. 276; Pando, "Elem. del Derecho Internacional," § 192; Kent, "Commentaries," vol. i, p. 118; Wheaton's "Elements," (Lawrence,) p. 720; Hautefeuille, "Droits et Devoirs des Nations neutres," vol. i, p. 347; Calvo, "Derecho Internacional," § 634; Twiss, "Law of Nations," vol. ii, p. 452.

United Kingdom or any of Her Majesty's dominions, was a ship of war, cruiser, or armed vessel in the service of any foreign Prince," &c., "*by adding to the number of the guns of such vessel, or by changing those on board for other guns, or by the addition of any equipment for war.*"

No person in either country ever imagined that these prohibitions would be infringed by allowing foreign belligerent steam-vessels to coal *ad libitum* in ports of Great Britain or of the United States. It is no more true that such vessels are specially enabled to continue their cruises and warlike operations, by means of supplies of coal so received, (however great in quantity,) than that sailing-ships of war are enabled to continue their cruises and warlike operations by substantial and extensive repairs in neutral ports to their hulls, masts, sails, and rigging, when damaged or disabled, or by unlimited supplies of water and other necessary provisions for their crews.

11. Universal understanding and practice

It was not by Great Britain only, but equally by France, Brazil, and other countries, that this view as to supplies of coal to Confederate vessels in neutral ports was acted upon throughout the war. In the letter already quoted of the Brazilian Minister, Señor Taques, to Mr. Webb, on the subject of the Sumter, (9th December, 1861,) he wrote:

> The hospitality, then, extended to the steamer Sumter at Maranham, in the terms in which it was presently afterwards given to the frigate Powhatan, involves no irregularity, reveals no dispositions offensive to the United States. It remains to know whether, in the exercise of this hospitality, the rights which restrict the commerce of neutrals with either belligerent were transgressed. This point involves the whole question, because Mr. Webb bases his argumentation and his complaints on the construction which he gives of contraband of war as to pit-coal. He insists strongly, as did his Consul, at Maranham, and Commodore Porter, on the idea that without coal the Sumter could not have continued her cruise. If this were a reason for forbidding the purchase of coal in the market, the States called Confederate would have the right to make the same complaint against the like permission presently afterwards given to the Powhatan; and if this reason could be brought forward in respect of coal, it could also be urged in respect of drinking-water and provisions, because without these none of these vessels could pursue their service. (British Appendix, vol. vi, p. 14.)

And he proceeded to show that coal was not, *jure gentium*, contraband of war.

When, therefore, the second Rule of the Treaty of Washington speaks of a neutral Government being bound "not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the *renewal or augmentation of military supplies or arms*, or the recruitment of men," it is no more intended to take away or limit the right of a neutral State to permit the coaling of steamers belonging to the war service of a belligerent within neutral waters, than to take away the right to permit them to receive provisions, or any other ordinary supplies, previously allowable under the known rules of international law.

12. Intention of the second Rule of the Treaty on this point.

With respect to the regulations made by the Queen of Great Britain on the 31st January, 1862, it is enough to say, that those regulations were voluntarily made by Her Majesty, in the exercise of her own undoubted right and discretion, as an independent neutral Sovereign, and not by virtue of any antecedent international obligation; that no belligerent Power could claim, under those rules, any greater benefit against the other belligerent, than that the rules themselves should be acted upon without partiality towards either of the contending parties; that the limitation of the quantity of coal to be supplied to the ships of war of the belligerents, in British ports, by these rules, was not absolute and unqualified, but was subject

13. British regulations of January 31, 1862.

to the exercise of a power given to the Executive Authorities of the various British possessions to enlarge that limit by special permission, when they should, in the exercise of a *bona fide* discretion, see cause to do so; and that these rules were, in fact, honestly and impartially acted upon by the British Government throughout the war, without any connivance or sanction whatever, with or to any violation or evasion of them, even if such violation or evasion could have been shown (which it clearly could not) to be the direct or proximate cause of any belligerent operation, resulting in loss to the Government or citizens of the United States.

CHAPTER IV.—PRINCIPLES OF CONSTRUCTION APPLICABLE TO THE RULES OF THE TREATY.

1. Importance of the second and third questions, as to the principles of construction applicable to the three Rules.

The two questions last considered (that of the supposed obligation of Great Britain, under the First Rule, to seize or detain such vessels as the Alabama or the Florida, when they came into British ports as duly commissioned public ships of war of the Confederate States, and as to her supposed obligation, under the Second Rule, either not to permit at all, or by an exact supervision to limit, the coaling of Confederate steam-vessels of war in British ports) involve points of such grave importance as to the principles of construction to be applied to those Rules for the purpose of the present controversy, that some further general observations on that subject seem to be imperatively called for.

2. Rules for the interpretation of public conventions and treaties.

Among the rules for the interpretation of Treaties, laid down by Vattel, (Articles 262–310,) are found the following:

(1.) Since the lawful interpretation of a contract ought to tend only to the discovery of the thoughts of the author or authors of that contract, as soon as we meet with any obscurity we should seek for what was probably in the thoughts of those who drew it up and interpret it accordingly. This is the general rule of all interpretations. It particularly serves to fix the sense of certain expressions the signification of which is not sufficiently determined. In virtue of this rule we should take those expressions in the most extensive sense, when it is probable that he who speaks has had in his view everything pointed out in this extensive sense; and, on the contrary, we ought to confine the signification, if it appears that the author has bounded his thoughts by what is comprehended in the more limited sense. (Art. 270.)

(2.) In the interpretation of treaties, pacts, and promises, we ought not to deviate from the common use of the language; at least if we have not very strong reasons for it. In all human affairs, where there is a want of certainty, we ought to follow probability. It is commonly very probable that they have spoken according to custom; this always forms a very strong presumption, which cannot be surmounted but by a contrary presumption that is still stronger. (Art. 271.)

(3.) Words are only designed to express the thoughts; thus the true signification of an expression in common use is the idea which custom has affixed to that expression. It is, then, a gross quibble to affix a particular sense to a word in order to elude the true sense of the entire expression.

(4.) When we manifestly see what is the sense that agrees with the intention of the Contracting Powers it is not permitted to turn their words to a contrary meaning. The intention, sufficiently known, furnishes the true matter of the Convention, of what is perceived and accepted, demanded and granted. To violate the Treaty is to go contrary to the intention, sufficiently manifested, rather than against the terms in which it is conceived; for the terms are nothing without the intention that ought to dictate them. (Art. 274.)

(5.) We ought always to give to expressions the sense most suitable to the subject or to the matter to which they relate. For we endeavor, by a true interpretation, to discover the thoughts of those who speak or of the Contracting Powers in a Treaty. Now, it ought to be presumed that he who has employed a word capable of many different significations has taken it in that which agrees with the subject. In proportion as he employs himself on the matter in question the terms proper to express his thoughts present themselves to his mind. This equivocal word could, then, only offer

itself in the sense proper to express the thought of him who makes use of it; that is, in the sense agreeable to the subject. (Art. 280.)

(6.) Every interpretation that leads to an absurdity ought to be rejected; or, in other words, we should not give to any piece a sense from which follows anything absurd, but interpret it in such a manner as to avoid absurdity. As it cannot be presumed that any one desires what is absurd, it cannot be supposed that he who speaks has intended that his words should be understood in a sense from which that absurdity follows. Neither is it allowable to presume that he sports with a serious act; for what is shameful and unlawful is not to be presumed. We call absurd not only that which is physically impossible, but what is morally so; that is, what is so contrary to right reason that it cannot be attributed to a man in his right senses. * * * The rule we have just mentioned is absolutely necessary, and ought to be followed, even when there is neither obscurity nor anything equivocal in the text of the law or the Treaty itself. For it must be observed that the uncertainty of the sense that ought to be given to a law or a Treaty does not merely proceed from the obscurity or any other fault in the expression, but also from the narrow limits of the human mind, which cannot foresee all cases and circumstances, nor include all consequences of what is appointed or promised; in short, from the impossibility of entering into this immense detail. We can only make laws or Treaties in a general manner; and the interpretation ought to apply them to particular cases, conformably to the intention of the legislature or of the Contracting Powers. Now, it cannot be presumed that in any case they would lead to anything absurd. When, therefore, their expressions, if taken in their proper and ordinary sense, lead to it, it is necessary to turn them from that sense just so far as is sufficient to avoid absurdity. (Art. 282.)

(7.) If he who has expressed himself in an obscure or equivocal manner has spoken elsewhere more clearly on the same subject, he is the best interpreter of himself. We ought to interpret his obscure or vague expressions in such a manner that they may agree with those terms that are clear and without ambiguity which he has used elsewhere, either in the same Treaty or in some other of the like kind. In fact, while we have no proof that a man has changed his mind or manner of thinking, it is presumed that his thoughts have been the same on the same occasions; so that if he has anywhere clearly shown his intention with respect to anything, we ought to give the same sense to what he has elsewhere said obscurely on the same affair. (Art. 284.)

(8.) Frequently, in order to abridge, people express imperfectly, and with some obscurity, what they suppose is sufficiently elucidated by the things which preceded it, or even what they propose to explain afterward; and besides, the expressions have a force, and sometimes even an entirely different signification, according to the occasion, their connection, and their relation to other words. The connection and train of the discourse is also another source of interpretation. We ought to consider the whole discourse together, in order perfectly to conceive the sense of it, and to give to each expression, not so much the signification it may receive in itself, as that it ought to have from the thread and spirit of the discourse. (Art. 285.)

(9.) The reason of the law or the Treaty, that is, the motive which led to the making of it, and the view there proposed, is one of the most certain means of establishing the true sense; and great attention ought to be paid it, whenever it is required to explain an obscure, equivocal, and undetermined point, either of law or of a Treaty, or to make an application of them to a particular case. (Art. 287.)

(10.) We use the restrictive interpretation to avoid falling into an absurdity. * * * The same method of interpretation takes place, when a case is presented, in which the law or Treaty, according to the rigor of the terms, leads to something unlawful. This exception must then be made; since nobody can promise to ordain what is unlawful. (Art. 293.)

(11.) When a case arises, in which it would be too prejudicial to any one to take a law or promise according to the rigor of the terms, a restrictive interpretation is also then used; and we except the case, agreeably to the intention of the legislature, or of him who made the promise. For the legislature requires only what is just and equitable; and in contracts no one can engage in favor of another, in such a manner as to be essentially wanting to himself. It is then presumed, with reason, that neither the legislature, nor the Contracting Powers, have intended to extend their regulation to cases of this nature; and that they themselves would have excepted them, had these cases presented themselves. (Art. 294.)

3. Applications of these principles to the interpretation of the three Rules, as to the points in controversy.

Let us apply these principles to the interpretation of the Rules of the present Treaty. The British interpretation of the latter part of the first Rule, which makes it applicable only to the prevention of the departure from British jurisdiction of vessels over which British jurisdiction had never ceased or been displaced, and whose warlike character rests only in an (as yet) unexecuted intention or purpose, is agreeable to the fifth, sixth, eighth, ninth, and tenth of the foregoing principles. The American interpretation,

which would extend it to vessels coming, as public ships of war of the Confederates, into British waters, without any notice beforehand that they would be either excluded or detained, is opposed to the same principles in the most marked manner, and especially it is opposed to those numbered 6 and 10, which are, perhaps, the most cogent and undeniable of them all.

The British interpretation of the first part of the second Rule, which applies the phrase "base of naval operations" in the same sense in which it has always been used by the leading authorities on international law, and particularly by those of Great Britain and the United States, (*e. g.*, by Lord Stowell and Chancellor Kent,) is in accordance with the second, third, and seventh of these principles; while the American interpretation, which would extend it to every combination of circumstances which those words, in their most lax, popular, and unscientific acceptation could possibly be made to embrace, offends against the same, and also against the tenth principle.

The British interpretation of the words "the renewal or augmentation of military supplies or arms," in the latter part of the second Rule, which applies them to augmentations of the warlike force of belligerent vessels, the same, or *ejusdem generis*, with those which were forbidden by President Washington's Rules, and by the British and American Foreign-Enlistment Acts, is in harmony with the second, third, fifth, seventh, eighth, and ninth of the foregoing principles. The American interpretation, which would extend them to supplies of articles, such as coals, which, according to the doctrine and practice of asylum and hospitality hitherto recognized and acted upon by all civilized nations, (notably by Great Britain and the United States,) were never yet deemed unlawful, and from the supply of which, in neutral ports, it would be highly prejudicial to two great maritime Powers, such as the two Contracting Parties, to debar themselves in case of their being engaged in war, in the present days of steam navigation, offends against the same principles, and also against that numbered 11.

4. Influence on the construction of the retrospective terms of the agreement.

The force of these objections to the American interpretation of the three Rules is greatly increased when it is borne in mind, first, that Great Britain agreed to their being retrospectively applied to the decision of "the questions between the two countries arising out of the claims mentioned in Article I" of the Treaty, those being the claims "growing out of acts committed by the several vessels which had given rise to the claims generically known as the Alabama Claims."

Down to the date of the Treaty no claim had ever been made against Great Britain, on the specific ground of supplies of coal to Confederate vessels; every claim for captures, of which any intelligible notice had been given, was in respect of captures by ships, said to have been equipped and fitted out in British ports, or to have received their armaments by means directly supplied from Great Britain. The British Government, therefore, was warranted in believing, as it did believe, that the controversy between itself and the Government of the United States was confined to claims growing out of acts committed by ships of this description only; and, in agreeing to the terms of the Rule, it could not be supposed to have had any claims in view which were grounded only on supplies of coal to Confederate vessels. A retrospective engagement of this sort cannot, without a complete departure from all the principles of justice, be enlarged by any uncertain or unnecessary implication.

The United States have expressly declared, in their Case, that they consider *all* the Rules—of course, therefore, the second—to be coinci-

dent with, and not to exceed, the previously known rules of international law. Great Britain, though taking a different view of the other Rules, has also expressly declared, in her Counter Case, that she too regards the second Rule as in no way enlarging the previously known prohibitions of international law, on the subject to which it relates. The practice of the United States, by habitually receiving supplies of coal in British ports during the war, was in accordance with the views of international law, applicable to this subject, which had been previously announced and acted upon by all the highest political and judicial authorities of that country. Thus it is made quite apparent that the construction now sought to be placed by the United States upon this second Rule is at variance with the real intention and meaning of both the Contracting Parties; and therefore with the 1st and 4th of the principles extracted from Vattel, as well as with the others already specified.

5. The admitted intention of both the parties as to the second Rule.

But further: not only did Great Britain consent to the retrospective application of those Rules, upon the footing formerly explained, to the determination of what she understood as "the claims generically known as the Alabama Claims," growing out of acts committed by particular vessels which had historically given rise to that designation, and of no other kind of claims; not only did the two Contracting Parties "agree to observe these Rules as between themselves in future;" but they also agreed to "bring them to the knowledge of other maritime Powers, and to invite them to accede to them."

6. Influence upon the construction of the agreement to propose the three Rules for general adoption to other maritime nations.

They did not attempt to make a general code of all the rules of international law connected with the subject; they were not careful, and did not attempt, to express the explanation or qualifications of any expressions used in these particular Rules, which a sound acquaintance with the rules and usages of international law would supply. Rules of this nature, which could rationally be supposed proper to be proposed for general acceptance to all the maritime Powers of the civilized world, must evidently have been meant to be interpreted in a simple and reasonable sense, conformable to, and not largely transcending the views of international maritime law and policy which would be likely to commend themselves to the general interests and intelligence of that portion of mankind. They must have been meant to be definitely, candidly, and fairly interpreted; not to be strained to every unforeseen and novel consequence, which perverse latitude of construction might be capable of deducing from the generality of their expressions. They must have been understood by their framers, and intended to be understood by other States, as assuring the continuance, and involving in their true interpretation the recognition of all those principles, rules, and practical distinctions, established by international law and usage, a departure from which was not required by the natural and necessary meaning of the words in which they were expressed; they cannot have been meant to involve large and important changes, upon subjects not expressly mentioned or adverted to by mere implication; nor to lay a series of traps and pitfalls, in future contingencies and cases, for all nations which might accede to them. Great Britain certainly, for her own part, agreed to them, in the full belief that the Tribunal of Arbitration, before which these claims would come, might be relied upon to reject every strained application of their phraseology, which could wrest them to purposes not clearly within the contemplation of both the Contracting Parties, and calculated to make them rather a danger to be avoided than a light to be followed by other nations.

ROUNDELL PALMER.

IV.—ARGUMENT OF MR. EVARTS, ONE OF THE COUNSEL OF THE UNITED STATES, ADDRESSED TO THE TRIBUNAL OF ARBITRATION AT GENEVA, ON THE 5TH AND 6TH AUGUST, 1872, IN REPLY TO THE SPECIAL ARGUMENT OF THE COUNSEL OF HER BRITANNIC MAJESTY. SEE PROTOCOLS XVII AND XVIII.

ARGUMENT OF MR. EVARTS.

At the Conference held on the 5th day of August Mr. Evarts addressed the Tribunal as follows:

Scope of the discussion.

In the course of the deliberations of the Tribunal it has seemed good to the Arbitrators, in pursuance of the provision of the fifth Article of the Treaty of Washington, to intimate that on certain specific points they would desire a further discussion on the part of the Counsel of Her Britannic Majesty for the elucidation of those points in the consideration of the Tribunal. Under that invitation the eminent Counsel for the British Government has presented an argument which distributes itself, as it seems to us, while dealing with the three points suggested, over a very general examination of the Argument which has already been presented on the part of the United States.

In availing ourselves of the right, under the Treaty, of replying to this special argument upon the points named by the Tribunal, it has been a matter of some embarrassment to determine exactly how far this discussion on our part might properly go. In one sense our deliberate judgment is that this new discussion has really added but little to the views or the Argument which had already been presented on behalf of the British Government, and that it has not disturbed the positions which had been insisted upon, on the part of the United States, in answer to the previous discussions on the part of the British Government, contained in its Case, Counter Case, and Argument.

But to have treated the matter in this way, and left our previous Argument to be itself such an answer as we were satisfied to rely upon to the new developments of contrary views that were presented in this special argument of the British Government, would have seemed to assume too confidently in favor of our Argument, that it was an adequate response in itself, and would have been not altogether respectful to the very able, very comprehensive, and very thorough criticism upon the main points of that Argument, which the eminent Counsel of Her Majesty has now presented. Nevertheless it seems quite foreign from our duty, and quite unnecessary for any great service to the Tribunal, to pursue in detail every point and suggestion, however pertinent and however skillfully applied, that is raised in this new argument of the eminent Counsel. We shall endeavor, therefore, to present such views as seem to us useful and valuable, and as tend in their general bearing to dispose of the difficulties and counter propositions opposed to our views in the learned Counsel's present criticism upon them.

The American Argument, presented on the 15th of June, as bearing upon these three points now under discussion, had distributed the subject under the general heads of the measure of international duties; of the means which Great Britain possessed for the performance of those duties; of the true scope and meaning of the phrase "due diligence," as used in the Treaty; of the particular application of the duties of the Treaty to the case of cruisers on their subsequent visits to British ports; and then of the faults, or failures, or shortcomings of Great Britain in its actual conduct of the transactions under review, in reference to these measures of duty, and this exaction of due diligence.

Due diligence.

The special topic now raised for discussion in the matter of "due diligence" generally considered, has been regarded by the Counsel of the British Government as involving a consideration, not only of the measure of diligence required for the discharge of ascertained duties, but also the discussion of what the measure of those duties was; and then of the exaction of due diligence as applicable to the different instances or occasions for the discharge of that duty, which the actual transactions in controversy between the parties disclosed. That treatment of the points is, of course, suitable enough, if, in the judgment of the learned Counsel, necessary for properly meeting the question specifically under consideration, because all those elements do bear upon the question of "due diligence" as relative to the time, and place, and circumstances that called for its exercise. Nevertheless, the general question, thus largely construed, is really equivalent to the main controversy submitted to the disposition of this Tribunal by the Treaty, to wit, whether the required due diligence has been applied in the actual conduct of affairs by Great Britain to the different situations for and in which it was exacted.

The reach and effort of this special argument in behalf of the British Government seem to us to aim at the reduction of the duties incumbent on Great Britain, the reduction of the obligation to perform those duties, in its source and in its authority, and to the calling back of the cause to the position assumed and insisted upon in the previous Argument in behalf of the British Government, that this was a matter not of international duty, and not of international obligation, and not to be judged of in the court of nations as a duty due by one nation, Great Britain, to another nation, the United States, but only as a question of its duty to itself, in the maintenance of its neutrality, and to its own laws and its own people, in exerting the means placed at the service of the Government by the Foreign-Enlistment Act for controlling any efforts against the peace and dignity of the nation.

The Rules of the Treaty the law of this Case.

We had supposed, and have so in our Argument insisted, that all that long debate was concluded by what had been settled by definitive convention between the two nations as the law of this Tribunal, upon which the conduct and duty of Great Britain, and the claims and rights of the United States, were to be adjudged, and had been distinctly expressed, and authoritatively and finally established in the Three Rules of the Treaty.

Sir R. Palmer's attempt to disparage the Rules examined.

Before undertaking to meet the more particular inquiries that are to be disposed of in this Argument, it is proper that, at the outset, we should take notice of an attempt to disparage the efficacy of those Rules, the source of their authority, and the nature of their obligation upon Great Britain. The first five sections of the special argument are devoted to this consideration. It is said that the only way that these Rules come to be important in passing judgment upon the conduct of Great Britain, in the matter of the

claims of the United States, is by the consent of Her Majesty that, in deciding the questions between the two countries arising out of these claims, the Arbitrators should assume that, during the course of these transactions, Her Majesty's Government had undertaken to act upon the principles set forth in these Rules, and in them announced. That requires, it is said, as a principal consideration, that the Tribunal should determine what the law of nations on these subjects would have been if these Rules had not been thus adopted. Then, it is argued that, as to the propositions of duty covered by the *first* Rule, the law of nations did not impose them, and that the obligation of Great Britain, therefore, in respect to the performance of the duties assigned in *that* Rule, was not derived from the law of nations, was not, therefore, a duty between it and the United States, nor a duty the breach of which called for the resentments or the indemnities that belong to a violation of the law of nations. Then, it is argued that the whole duty and responsibility and obligation in that regard, on the part of Great Britain, arose under the provisions of its domestic legislation, under the provisions of the Foreign-Enlistment Act, under a general obligation by which a nation, having assigned a rule of conduct for itself, is amenable for its proper and equal performance as between and toward the two belligerents. Then, it is argued that this assent of the British Government, that the Tribunal shall regard that Government as held to the performance of the duties assigned in those Rules, in so far as those Rules were not of antecedent obligation in the law of nations, is not a consent that Great Britain shall be held under an international obligation to perform the Rules in that regard, but simply as an agreement that they had undertaken to discharge, as a municipal obligation, under the provisions of their Foreign-Enlistment Act, duties which were equivalent in their construction of the act to what is now assigned as an international duty; and this argument thus concludes:

> When, therefore, Her Majesty's Government, by the sixth article of the Treaty of Washington, agreed that the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in the Three Rules, (though declining to assent to them as a statement of principles of international law, which were in force at the time when the claims arose,) the effect of that argument was not to make it the duty of the Arbitrators to judge retrospectively of the conduct of Her Majesty's Government, according to any false hypothesis of law or fact, but to acknowledge, as a rule of judgment for the purposes of the Treaty, the undertaking which the British Government had actually and repeatedly given to the Government of the United States, to act upon the construction which they themselves placed upon the prohibitions of their own municipal law, according to which it was coincident in substance with those Rules.—(*British Special Argument*, p. 389.)

Now, we may very briefly, as we think, dispose of this suggestion, and of all the influences that it is appealed to to exert throughout the course of the discussion in aid of the views insisted upon by the learned Counsel. In the first place, it is not a correct statement of the Treaty to say, that the obligation of these Rules, and the responsibility on the part of Great Britain to have its conduct judged according to those Rules, arise from the assent of Her Majesty thus expressed. On the contrary, that assent comes in only subsequently to the authoritative statement of the Rules, and simply as a qualification attendant upon a reservation on the part of Her Majesty, that the previous declaration shall not be esteemed as an assent *on the part of the British Government*, that those were in fact the principles of the law of nations at the time the transactions occurred.

The sixth article of the Treaty thus determines the authority and the obligation of these Rules. I read from the very commencement of the article: "In deciding the matters submitted to the Arbitrators they

shall be governed by the following three Rules, which are agreed upon by the High Contracting Parties as Rules to be taken as applicable to the case and by such principles of International Law not inconsistent therewith;" and then the Rules are stated.

Now, there had been a debate between the diplomatic representatives of the two Governments, whether the duties expressed in those Rules were wholly of international obligation antecedent to this agreement of the parties. The United States had from the beginning insisted that they were; Great Britain had insisted that, in regard to the outfit and equipment of an *unarmed* ship from its ports, there was only an obligation of municipal law and not of international law; that its duty concerning such outfit was wholly limited to the execution of its Foreign-Enlistment Act; that the discharge of that duty and its responsibility for any default therein could not be claimed by the United States as matter of international law, nor upon any judgment otherwise than of the general duty of a neutral to execute its laws, whatever they might be, with impartiality between the belligerents.

To close that debate, and in advance of the submission of any question to this Tribunal, the law on that subject was settled by the Treaty, and settled in terms which, so far as the obligation of the law goes, seem to us to admit of no debate, and to be exposed to not the least uncertainty or doubt. But in order that it might not be an imputation upon the Government of Great Britain, that while it presently agreed that the duties of a neutral were as these Rules express them, and that these Rules were applicable to this case, that a neutral nation was bound to conform to them, and that they should govern this Tribunal in its decision—in order that from all this there might not arise an imputation that the conduct of Great Britain, at the time of the transactions, (if it should be found in the judgment of this Tribunal to have been at variance with these Rules,) would be subject to the charge of a variance with an acknowledgment of the Rules then presently admitted as binding, a reservation was made. What was that reservation?

> Her Britannic Majesty has commanded her High Commissioners and Plenipotentiaries to declare that Her Majesty's Government cannot assent to the foregoing Rules as a statement of principles of international law which were in force at the time when the claims mentioned in Article I arose, but that Her Majesty's Government, in order to evince its desire of strengthening the friendly relations between the two countries, and of making satisfactory provision for the future, agrees that, in deciding the questions between the two countries arising out of these claims, the Arbitrators should assume that Her Majesty's Government had undertaken to act upon the principles set forth in these Rules.

Thus, while this saving clause in respect to the past conduct of Great Britain was allowed on the declaration of Her Majesty, yet that declaration was admitted into the Treaty only upon the express proviso that it should have no import of any kind in disparaging the obligation of the Rules, their significance, their binding force, or the principles upon which this Tribunal should judge concerning them.

Shall it be said that when the whole office of this clause, thus referred to, is of that nature and extent only, and when it ends in the determination that that reservation shall have *no effect* upon *your decision*, shall it, I say, be claimed that this reservation shall have an effect upon the argument? How shall it be pretended, before a Tribunal like this, that what is to be *assumed* in the decision is not to be assumed in the argument?

But what does this mean? Does it mean that these Three Rules, in their future application to the conduct of the United States—nay, in their future application to the conduct of Great Britain, mean something different from what they mean in their application to the past?

What becomes, then, of the purchasing consideration of these Rules for the future, to wit, that, waiving debate, they shall be applied to the past?

We must, therefore, insist that, upon the plain declarations of this Treaty, there is nothing whatever in this proposition of the first five sections of the new special argument. If there were anything in it, it would go to the rupture, almost, of the Treaty; for the language is plain, the motive is declared, the force in future is not in dispute, and, for the consideration of that force in the future, the same force is to be applied in the judgment of this Tribunal upon the past. Now, it is said that this declaration of the binding authority of these Rules is to read in the sense of this very complicated, somewhat unintelligible, proposition of the learned Counsel. Compare his words with the declaration of the binding authority of these Rules, as Rules of International Law, actually found in the Treaty, and judge for yourselves whether the two forms of expression are equivalent and interchangeable.

Can any one imagine that the United States would have agreed that the construction, in its application to the past, was to be of this modified, uncertain, optional character, while, in the future, the Rules were to be authoritative, binding Rules of the law of nations? When the United States had given an assent, by convention, to the law that was to govern this Tribunal, was it intended that that law should be construed, as to the past, differently from what it was to be construed in reference to the future?

I apprehend that this learned Tribunal will at once dismiss this consideration, with all its important influence upon the whole subsequent argument of the eminent Counsel, which an attentive examinatinon of that argument will disclose.

How far the Tribunal may resort to the rules of international law.

With this proposition falls the further proposition, already met in our former Argument, that it is material to go into the region of debate as to what the law of nations upon these subjects, now under review, was or is. So far as it falls within the range covered by these Rules of the Treaty, their provisions have concluded the controversy. To what purpose, then, pursue an inquiry and a course of argument which, whatever way in the balance of your conclusions it may be determined, cannot affect your judgment or your award? If these Rules are found to be conformed to the law of nations in the principles which it held antecedent to their adoption, the Rules cannot have for that reason any greater force than by their own simple, unconfirmed authority. If they differ from, if they exceed, if they transgress the requirements of the law of nations, as it stood antecedent to the Treaty, by so much the greater force does the convention of the parties require that, for this trial and for this judgment, these Rules are to be the law of this Tribunal. This argument is hinted at in the Counter Case of the British Government; it has been the subject of some public discussion in the press of Great Britain. But the most authoritative expression of opinion upon this point from the press of that country has not failed to stigmatize this suggestion as bringing the obligation of the Rules of this Treaty down to "the vanishing point."[1]

Sir R. Palmer's principles for the construction of Treaties examined.

At the close of the special argument we find a general presentation of canons for the construction of treaties, and some general observations as to the light or the controlling reason under which these Rules of the Treaty should be construed. These suggestions may be briefly dismissed.

[1] London Times, February, 1872.

It certainly would be a very great reproach to these nations, which had deliberately fixed upon three propositions as expressive of the law of nations, in their judgment, for the purposes of this trial, that a resort to general instructions, for the purpose of interpretation, was necessary. Eleven canons of interpretation drawn from Vattel are presented in order, and then several of them, as the case suits, are applied as valuable in elucidating this or that point of the Rules. But the learned Counsel has omitted to bring to your notice the first and most general rule of Vattel, which, being once understood, would, as we think, dispense with any consideration of these subordinate canons which Vattel has introduced to be used only in case his first general rule does not apply. This first proposition is, that "it is not allowable to interpret what has no need of interpretation."

Now these Rules of the Treaty are the deliberate and careful expression of the will of the two nations in establishing the LAW for the government of this Tribunal, which the Treaty calls into existence. These Rules need no interpretation in any general sense. Undoubtedly there may be phrases which may receive some illustration or elucidation from the history and from the principles of the law of nations; and to that we have no objection. Instances of very proper application to that resort occur in the argument of which I am now replying. But there can be no possible need to resort to any general rules, such as those most favored and insisted upon by the learned Counsel, viz, the sixth proposition of Vattel, that you never should accept an interpretation that leads to an absurdity—or the tenth, that you never should accept an interpretation that leads to a crime. Nor do we need to recur to Vattel for what is certainly a most sensible proposition, that the reason of the Treaty—that is to say, the motive which led to the making of it and the object in contemplation at the time—is the most certain clue to lead us to the discovery of its true meaning.

But the inference drawn from that proposition, in its application to this case, by the learned Counsel, seems very wide from what to us appears natural and sensible. The aid which he seeks under the guidance of this rule is from the abstract proposition of publicists on cognate subjects or the illustrative instances given by legal commentators.

Our view of the matter is that, as this Treaty is applied to the past, as it is applied to an actual situation between the two nations, and as it is applied to settle the doubts and disputes which existed between them as to obligation and to the performance of obligations, these considerations furnish the resort, if any is needed, whereby this Tribunal should seek to determine what the true meaning of the High Contracting Parties is.

Now, as bearing upon all these three topics, of due diligence, of treatment of offending cruisers in their subsequent visits to British ports, and of their supply, as from a base of operations, with the means of continuing the war, these Rules are to be treated in reference to the controversy as it had arisen and as it was in progress between the two nations when the Treaty was formed. What was that? Here was a nation prosecuting a war against a portion of its population and territory in revolt. Against the sovereign thus prosecuting his war there was raised a maritime warfare. The belligerent itself, thus prosecuting this maritime warfare against its sovereign, confessedly had no ports and no waters that could serve as the base of its naval operations. It had no ship-yards, it had no founderies, it had no means or resources by which it could maintain or keep on foot that war. A project and a purpose of war was all that could have origin from within its territory, and

the pecuniary resources by which it could derive its supply from neutral nations was all that it could furnish toward this maritime war.

Now, that war having in fact been kept on foot and having resulted in great injuries to the sovereign belligerent, gave occasion to a controversy between that sovereign and the neutral nation of Great Britain as to whether these actual supplies, these actual bases of maritime war from and in neutral jurisdiction, were conformable to the law of nations or in violation of its principles. Of course, the mere fact that this war had thus been kept on foot did not, of itself, carry the neutral responsibility. But it did bring into controversy the opposing positions of the two nations. Great Britain contended during the course of the transactions, and after their close, and now here contends, that, however much to be regretted, these transactions did not place any responsibility upon the neutral, because they had been effected only by such communication of the resources of the people of Great Britain as under international law was innocent and protected; that commercial communication and the resort for asylum or hospitality in the ports was the entire measure, comprehension, and character of all that had occurred within the neutral jurisdiction of Great Britain. The United States contended to the contrary. What, then, was the solution of the matter which settles amicably this great dispute? Why, first, that the principles of the law of nations should be settled by convention, as they have been, and that they should furnish the guide and the control of your decision; second, that all the facts of the transactions as they occurred should be submitted to your final and satisfactory determination; and, third, that the application of these principles of law settled by convention between the parties to these facts as ascertained by yourselves should be made by yourselves, and should, in the end, close the controversy and be accepted as satisfactory to both parties.

In this view, we must insist that there is no occasion to go into any very considerable discussion as to the meaning of these Rules, unless in the very subordinate sense of the explanation of a phrase, such as "base of operations," or "military supplies," or "recruitment of men," or some similar matter.

Effect of a commission.

I now ask your attention to the part of the discussion which relates to the effect of a "commission," which, though made the subject of the second topic named by the tribunal, and taken in that order by the learned Counsel, I propose first to consider.

United States construction of the first Rule.

It is said that the claims of the United States in this behalf, as made in their Argument, rest upon an exaggerated construction of the second clause of the first Rule. On this point, I have first to say that the construction which we put upon that clause is not exaggerated; and, in the second place, that these claims in regard to the duty of Great Britain in respect to commissioned cruisers that have had their origin in an illegal outfit in violation of the law of nations, as settled in the first Rule, do not rest exclusively upon the second clause of the first Rule. They, undoubtedly, in one construction of that clause, find an adequate support in its proposition; but, if that construction should fail, nevertheless, the duty of Great Britain, in dealing with these offending cruisers in their subsequent resort to its ports and waters, would rest upon principles quite independent of this construction of the second clause.

The second clause of that Rule is this: "And also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted in whole or in part within such jurisdiction to warlike use."

It is said that this second clause of the first Rule manifestly applies only to the *original* departure of such a vessel from the British jurisdiction, while its purposes of unlawful hostility still remain in intention merely, and have not been evidenced by execution.

If this means that a vessel that had made its first evasion from a British port, under circumstances which did not inculpate Great Britain for failing to arrest her, and then had come within British ports a second time, and the evidence, as then developed, would have required Great Britain to arrest her, and would have inculpated that nation for failure so to do, is not within the operation of this Rule, I am at a loss to understand upon what principle of reason this pretension rests. If the meaning is that this second clause only applies to such offending vessels while they remain in the predicament of not having acquired the protection of a "commission," that pretension is a begging of the question under consideration, to wit, what the effect of a "commission" is under the circumstances proposed.

I do not understand exactly whether these two cases are meant to be covered by this criticism of the learned Counsel. But let us look at it. Supposing that the escape of the Florida from Liverpool, in the first instance, was not under circumstances which made it an injurious violation of neutrality for which Great Britain was responsible to the United States, that is to say, that there was no such fault, from inattention to evidence, or from delay or inefficiency of action, as made Great Britain responsible for her escape; and supposing, when she entered Liverpool again, as the matter then stood in the knowledge of the Government, the evidence was clear and the duty was clear, if it were an original case; is it to be said that the duty is not as strong, that it is not as clear, and that a failure to perform it is not as clear a case for inculpation as if in the original outset the same circumstances of failure and of fault had been apparent? Certainly the proposition cannot mean this. Certainly the conduct of Great Britain in regard to the vessel at Nassau, a British port into which she went after her escape from Liverpool, does not conform to this suggestion. But if the proposition does not come to this, then it comes back to the pretension that the commission intervening terminates the obligation, defeats the duty, and exposes the suffering belligerent to all the consequences of this naval war, illegal in its origin, illegal in its character, and, on the part of the offending belligerent, an outrage upon the neutral that has suffered it.

Now, that is the very question to be determined. Unquestionably, we submit that, while the first clause of the first Rule is, by its terms, limited to an original equipment or outfit of an offending vessel, the second clause was intended to lay down the obligation of detaining in port, and of preventing the departure of, every such vessel whenever it should come within British jurisdiction. I omit from this present statement, of course, the element of the effect of the "commission," that being the immediate point in dispute.

I start in the debate of that question with this view of the scope and efficacy of the Rule itself.

It is said, however, that the second clause of the first Rule is to be qualified in its apparent signification and application by the supplying a phrase used in the first clause which, it is said, must be communicated to the second. That qualifying phrase is "any vessel *which it has reasonable ground to believe* is intended," &c.

Now, this qualification is in the first clause, and it is not in the sec-

Effect of the words "reasonable ground to believe."

ond. Of course this element of having "reasonable ground to believe" that the offense which a neutral nation is required to prevent is about to be committed, is an element of the question of *due diligence* always fairly to be considered, always suitably to be considered in judging either of the conduct of Great Britain in these matters, or of the conduct of the United States in the past, or of the duty of both nations in the future. As an element of due diligence, it finds its place in the second clause of the first Rule, but only as an element of due diligence.

Now, upon what motive does this distinction between the purview of the first clause and of the second clause rest? Why, the duty in regard to these vessels embraced in the *first* clause applies to the inchoate and progressive enterprise at every stage of fitting out, arming, or equipping, and while that enterprise is, or may be, in respect to evidence of its character, involved in obscurity, ambiguity, and doubt. It is, therefore, provided that, in regard to *that* duty, only such vessels are thus subjected to interruption in the progress of construction at the responsibility of the neutral as the neutral has "reasonable ground to believe" are intended for an unlawful purpose, which purpose the vessel itself does not necessarily disclose either in regard to its own character or of its intended use. But, after the vessel has reached *its form* and completed its structure, why, then, it is a sufficient limitation of the obligation and sufficient protection against undue responsibility, that "due diligence to prevent" the assigned offense is alone required. Due diligence to accomplish the required duty is all that is demanded, and accordingly that distinction is preserved. It is made the clear and absolute duty of a nation to use due diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war against a power with which it is at peace, such vessel *having been* specially adapted in whole or in part within such jurisdiction to warlike use. That is, when a vessel has become ready to take the seas, having its character of warlike adaptation thus determined and thus evidenced, so upon its subsequent visit to the neutral's port, as to such a vessel, the duty to arrest her departure is limited only by the——

Chief Justice COCKBURN. "What should you think, Mr. Evarts, of such a case as this? Suppose a vessel had escaped from Great Britain with or without due diligence being observed—take the case of the Florida or the Shenandoah—take either case. She puts into a port belonging to the British Crown. You contend, if I understand your argument, that she ought to be seized. But suppose the authorities at the port into which she puts are not aware of the circumstances under which the vessel originally left the shores of Great Britain. Is there an obligation to seize that vessel?"

Mr. EVARTS. That, like everything else, is left as matter of fact.

The CHIEF JUSTICE. "But suppose the people at the place are perfectly unaware from whence this vessel——"

Mr. EVARTS. I understand the question. We are not calling in judgment the authorities at this or that place. We are calling into judgment the British nation, and if the ignorance and want of knowledge in the subordinate officials at such a port can be brought to the fault of the Home Government in not advising or keeping them informed, that is exactly the condition from which the responsibility arises. It is a question of "due diligence," or not, of the *nation* in all its conduct in providing, or not providing, for the situation, and in preparing, or not preparing, its officials to act upon suitable knowledge.

We find nothing of any limitation of this second clause of the first

Rule that prevents our considering its proper application to the case of a vessel which, for the purpose of the present argument, it must be conceded ought to be arrested under it, and detained in port if the "commission" does not interpose an obstacle.

We have laid down at pages from 152 to 154 in our Argument, what we consider the rules of law in regard to the effect of the "commission" of a sovereign nation, or of a belligerent not recognized as a sovereign, in the circumstances involved in this inquiry. They are very simple. I find nothing in the argument of my learned friend, careful and intelligent as it is, that disturbs these rules as rules of law. The public ship of a nation, received into the waters or ports of another nation, is, by the practice of nations, as a concession to the sovereign's dignity, exempt from the jurisdiction of the courts and all judicial process of the nation whose waters it visits. This is a concession, mutual, reciprocal between nations having this kind of intercourse, and resting upon the best and surest principles of international comity. But there is no concession of extra-territoriality to the effect or extent that the *sovereign* visited is *predominated* over by the sovereign receiving hospitality to its public vessels. The principle simply is, that the treatment of the vessel rests upon considerations between the nations as sovereign, and in their political capacities, as matter to be dealt with directly between them, under reciprocal responsibility for offense on either side, and under the duty of preserving relations of peace and good-will if you please, but nevertheless to be controlled by reasons of state.

The rules of law respecting the effect of a commission.

Extent of the right of exterritoriality given to ships of war.

Any construction of the rule that would allow the visiting vessel to impose its own sovereignty upon the sovereign visited, would be to push the rule to an extreme that would defeat its purpose. It is the equality of sovereigns that requires that the process and the jurisdiction of courts should not be extended to public vessels.

But all other qualifications as to how the sovereign visited shall deal with public vessels rest in the discretion of the sovereign. If offense is committed by such vessels, or any duty arises in respect to them, he, at his discretion and under international responsibility, makes it the subject of remonstrance, makes it the subject of resentment, makes it the subject of reprisal, or makes it the subject of an immediate exercise of force if the circumstances seem to exact it.

What, then, is the tenor of the authorities, in respect to a public vessel not of a sovereign, but of a belligerent, who has not been recognized as a sovereign? The courts of the country, when the question arises as a judicial one, turn to the political authority, and ask how that has determined the question of the public character of such vessels; and if that question (which is a political one) has been determined in recognition of the belligerency, then the vessel of the belligerent is treated as exempt from judicial process and from the judisdiction of the courts. But that vessel remains subject to the control, subject to the dominion of the sovereign whose ports it has visited, and it remains there under the character of a limited recognition, and not in the public character of a representative of recognized sovereignty.

We understand the motives by which belligerency is recognized while sovereignty is refused. They are the motives of humanity; they are the motives of fair play; they are the motives of neutral recognition of the actual features of the strife of violence that is in progress. But it is in vain to recognize belligerency and deny sovereignty, if you are going to attract one by one all the traits of sovereignty, in the relations with

a power merely recognized as belligerent and to whom sovereignty has been denied.

Recognition of belligerency not a recognition of sovereignty.

What is the difference of predicament? Why, the neutral nation, when it has occasion to take offense or exercise its rights with reference to a belligerent vessel not representing a sovereign, finds no sovereign behind that vessel to which it can appeal, to which it can remonstrate, by which through diplomacy, by which through reprisals, by which in resentments, it can make itself felt, its dominion respected, and its authority obeyed. It then deals with these belligerent vessels not unjustly, not capriciously, for injustice and caprice are wrong toward whomsoever they are exercised, but, nevertheless, upon the responsibility that its dealing must reach the conduct, and that the vessel and its conduct are the only existing power and force to which it can apply itself.

I apprehend that there is no authority from any book that disturbs in the least this proposition, or carries the respect to belligerent vessels beyond the exemption from jurisdiction of courts and judicial process. The rule of law being of this nature, the question, then, of how a neutral shall deal with one of these cruisers that owes its existence to a violation of its neutral rights, and then presents itself for hospitality in a port of the neutral, is a question for the neutral to determine according to its duty to itself, in respect to its violated neutrality and its duty to the sovereign belligerent, who will lay to its charge the consequences and the responsibility for this offending belligerent.

Now, I find in the propositions of the eminent Counsel a clear recognition of these principles of power on the part of the sovereign, and of right on the part of the sovereign, requiring only that the power should be exercised suitably and under circumstances which will prevent it from working oppression or unnecessary injury. That makes it a question, therefore, as to the dealing of the sovereign for which the law of nations applies no absolute rule. It then becomes a question for the Tribunal whether (under these circumstances of cruisers that owe their origin or their power to commit these injuries to their violation of neutrality) Great Britain is responsible to the injured sovereign, the United States, for this breach of neutrality, for this unlawful birth, for this unlawful support of these offending cruisers. As to what the duty of a neutral nation is in these circumstances and in these relations, when the offending cruiser is again placed within its power, I find really no objection made to the peremptory course we insist upon, except that seizing such a vessel, *without previous notice*, would be impolite, would be a violation of comity, would be a violation of the decorous practice of nations, and would be so far a wrong.

Application of the principles.

Well, let us not discuss these questions in the abstract merely; let us apply the inquiry to the actual conduct of Great Britain in the actual circumstances of the career of these cruisers. If Great Britain claimed exemption from liability to the United States by saying that, when these cruisers had, confessedly, in fact escaped in violation of neutrality, and confessedly were on the seas propagating those enormous injuries to the property and commerce of a friendly nation, it had promptly given notice that no one of them should ever after enter its ports, and that, if it did enter its ports, it would be seized and detained, then this charge that the conduct of Great Britain toward these cruisers in their subsequent visits to its ports was such as to make it responsible for their original escape or for their subsequent career, would be met by this palliation or this defense. But no such case arises upon the proofs. You have then, on the one hand, a clear duty

toward the offended belligerent, and on the other only the supposed obligation of courtesy or comity toward the offending belligerent. This courtesy, this comity, it is conceded, can be terminated at any time at the will of the neutral sovereign. But this comity or this courtesy has not been withdrawn by any notice, or by any act of Great Britain during the entire career of these vessels.

We say then, in the first place, that there is no actual situation which calls for a consideration of this palliative defense, because the circumstances do not raise it for consideration. On the contrary, the facts as recorded show the most absolute indifference, on the part of Great Britain, to the protracted continuance of the ravages of the Alabama and of the Florida, whose escape is admitted to be a scandal and a reproach to Great Britain, until the very end of the war.

And, yet, a subtraction of comity, a withdrawal of courtesy, was all that was necessary to have determined their careers.

But, further, let us look a little carefully at this idea that a cruiser, illegally at sea by violation of the neutrality of the nation which has given it birth, is in a condition, on its first visit to the ports of the offended neutral, after the commission of the offense to claim the allowance of courtesy or comity. Can it claim courtesy or comity, by reason of anything that has proceeded from the neutral nation to encourage that expectation? On the contrary, so far from its being a cruiser that has a right to be upon the sea, and to be a claimant of hospitality, it is a cruiser, on the principles of international law, (by reason of its guilty origin, and of the necessary consequences of this guilt to be visited upon the offended neutral,) for whose hostile ravages the British Government is responsible. What courtesy, then, does that Government owe to a belligerent cruiser that thus practiced fraud and violence up its neutrality and exposed it to this odious responsibility? Why does the offending cruiser need notice that it will receive the treatment appropriate to its misconduct and to the interests and duty of the offended neutral? It is certainly aware of the defects of its origin, of the injury done to the neutral, and of the responsibility entailed upon the neutral for the injury to the other belligerent. We apprehend that this objection of courtesy to the guilty cruiser that is set up as the only obstacle to the exercise of an admitted power, that this objection which maintains that a power just in itself, if executed without notice, thereby becomes an imposition and a fraud upon the offender because no denial of hospitality has been previously announced, is an objection which leaves the ravages of such a cruiser entirely at the responsibility of the neutral which has failed to intercept it.

It is said in the special argument of the learned Counsel, that no authority can be found for this exercise of direct sovereignty on the part of an offended neutral toward a cruiser of either a recognized or an unrecognized sovereignty. But this after all comes only to this, that such an exercise of direct control over a cruiser, on the part of an offended neutral, without notice, is not according to the common course of hospitality for public vessels whether of a recognized sovereign or of a recognized belligerent. As to the right to exercise direct authority on the part of the displeased neutral to secure itself against insult or intrusion on the part of a cruiser that has once offended its neutrality, there is no doubt.

The argument that this direct control may be exercised by the displeased neutral without the intervention of notice, when the gravity and nature of the offense against neutrality on the part of the belligerent justify this measure of resentment and resistance, needs no in-

stance and no authority for its support. In its nature, it is a question wholly dependent upon circumstances.

Our proposition is, that all of these cruisers drew their origin out of the violated neutrality of Great Britain, exposing that nation to accountability to the United States for their hostilities. Now, to say that a nation thus situated is required by any principles of comity to extend a notice before exercising control over the offenders brought within its power, seems to us to make justice and right, in the gravest responsibilities, yield to mere ceremonial politeness.

To meet, however, this claim on our part, it is insisted, in this special argument, that the equipment and outfit of a cruiser in a neutral port, if it goes out *unarmed* (though capable of becoming an instrument of offensive or defensive war by the mere addition of an armament) may be an *illegal* act as an offense against municipal law, but is not a violation of neutrality in the sense of being a *hostile* act, and does not place the offending cruiser in the position of having violated neutrality. That is but a recurrence to the subtle doctrine that the obligations of Great Britain in respect to the first Rule of the Treaty are not, by the terms of the Treaty, made *international* obligations, for the observance of which she is responsible under the law of nations, and for the permissive violation of which she is liable, as having allowed, in the sense of the law of nations, a hostile act to be perpetrated on her territory.

Acts done in violation of neutrality are hostile acts.

This distinction between a merely illegal act and a hostile act, which is a violation of neutrality, is made of course, and depends wholly, upon the distinction of the evasion of an *unarmed* ship of war being prohibited only by municipal law and not by the law of nations, while the evasion of an *armed* ship is prohibited by the law of nations. This is a renewal of the debate between the two nations as to what the rule of the law of nations in this respect was. But this debate was finally closed by the Treaty. And, confessedly, on every principle of reason, the moment you stamp an act as a violation of neutrality, you include it in the list of acts which by the law of nations are deemed *hostile* acts. There is no act that the law of nations prohibits within the neutral jurisdiction that is not in the nature of a *hostile* act, that is not in the nature of an *act of war*, that is not in the nature of *an application by the offending belligerent of the neutral territory to the purposes of his war against the other belligerent.* The law of nations prohibits it, the law of nations punishes it, the law of nations exacts indemnity for it, only because it is a *hostile* act.

Now, suppose it were debatable before the Tribunal whether the emission of a war-ship without the addition of her armament, was a violation of the law of nations, on the same reason, and only on that reason, it would be debatable whether it were a hostile act. If it were a hostile act, it was a violation of the law of nations; if it were not a violation of the law of nations, it was not so, only because it was not a hostile act. When, therefore, the Rules of the Treaty settle that debate in favor of the construction claimed by the United States in its antecedent history and conduct, and determine that such an act *is* a violation of the law of nations, they determine that it is a hostile act. There is no escape from the general proposition that the law of nations condemns nothing done in a neutral territory unless it is done in the nature of a hostile act. And when you debate the question whether any given act within neutral jurisdiction is or is not forbidden by the law of nations, you debate the question whether it is a hostile act or not.

Now, it is said that this outfit without the addition of an armament is not a *hostile* act under the law of nations, *antecedent* to this Treaty.

That is immaterial within the premises of the controversy before this Tribunal.

It is a hostile act against Great Britain, which Great Britain——

Sir ALEXANDER COCKBURN. "Do I understand you, Mr. Evarts, to say that such an act is a hostile act against Great Britain?"

Mr. EVARTS. Yes, a hostile violation of the neutrality of Great Britain, which, if not repelled with due diligence, makes Great Britain responsible for it as a hostile act within its territory against the United States.

This argument of the eminent Counsel concedes that if an armament is added to a vessel within the neutral territory it is a hostile act within that territory, it is a hostile expedition set forth from that territory. It is therefore a violation of the law of nations, and if due diligence is not used to prevent it, it is an act for which Great Britain is responsible. If due diligence to prevent it be or be not used, it is an offense against the neutral nation by the belligerent which has consummated the act.

A neutral nation, against the rights of which such an act has been committed, to wit, the illegally fitting out a war-ship without armament, (condemned by the law of nations as settled by this Treaty,) is under no obligation whatever of courtesy or comity to that cruiser. If, under such circumstances, Great Britain prefers courtesy and comity to the offending cruiser and its sponsors, rather than justice and duty to the United States, she does it upon motives which satisfy her to continue her responsibility for that cruiser rather than terminate it. Great Britain has no authority to exercise comity and courtesy to these cruisers at the expense of the offended belligerent, the United States, whatever her motives may be. Undoubtedly the authorities conducting the rebellion would not have looked with equal favor upon Great Britain if she had terminated the career of these cruisers by seizing them or excluding them from her ports. That is a question between Great Britain and the belligerent that has violated her neutrality. Having the powers, having the right, the question of courtesy in giving notice was to be determined at the cost of Great Britain and not at the expense of the United States. But it ceases to be a question of courtesy when the notice has not been given at all, and when the choice has thus been made that these cruisers shall be permitted to continue their career unchecked.

The neutral whose neutrality has been violated is under no obligation of comity to the violator.

Now on this question, whether the building of a vessel of this kind without the addition of armament is proscribed by the law of nations, and proscribed as a hostile act and as a violation of neutral territory, (outside of the Rules of the Treaty,) which is so much debated in this special argument, I ask attention to a few citations, most of which have been already referred to in the American Case.

Authorities to show that the construction in neutral territories of a ship intended to carry on war against a belligerent is forbidden by the law of nations.

Hautefeuille, as cited upon page 170, says:

Le fait de construire un bâtiment de guerre pour le comte d'un belligérant ou de l'armer dans les états neutres est une violation du territoire. * * * * Il peut également réclamer le désarmement du bâtiment illégalement armé sur son territoire et même le détenir, s'il entre dans quelque lieu soumis à sa souveraineté jusqu'à ce qu'il ait été désarmé.

Ortolan, as quoted on page 182 of the same Case, passes upon this situation, which we are now discussing, as follows:

Nous nous rattacherons pour résoudre en droit des gens les difficultés que presente cette nouvelle situation, à un principe universellement établi, qui se formule en ce peu de mots "inviolabilité du territoire neutre." Cet inviolabilité est un droit pour l'état neutre, dont le territoire ne doit pas être atteint par les faits de guerre, mais elle

impose aussi à ce même état neutre une étroite obligation, celle de ne pas permettre, celle d'empêcher, activement au besoin, l'emploi de ce territoire par une des parties ou au profit de l'une des parties belligérantes dans un but hostile à l'autre partie.

And this very question, the distinction between an armed vessel and an unarmed vessel, was met by Lord Westbury, in observations made by him, and which are quoted in the American Case at page 185. He said:

There was one rule of conduct which undoubtedly civilized nations had agreed to observe, and it was that the territory of a neutral should not be the base of military operations by one of two belligerents against the other. In speaking of the base of operations, he must, to a certain degree, differ from the noble earl, (Earl Russell.) It was not a question whether armed ships had actually left our shores; but it was a question whether ships with a view to war had been built in our ports by one of two belligerents. They need not have been armed; but if they had been laid down and built with a view to warlike operations by one of two belligerents, and this was knowingly permitted to be done by a neutral power, it was unquestionably a breach of neutraltiy.

Chancellor Kent, in a passage cited by the learned Counsel with approval, speaking of the action of the United States as shown in the rules of President Washington's administration, (which rules are also subsequently quoted with approval in this Argument,) says, (vol. i, page 122:)

The Government of the United States was warranted by the law and practice of nations, in the declaration made in 1793 of the rules of neutrality, which were particularly recognized as necessary to be observed by the belligerent powers in their intercourse with this country. These rules were that *the original arming or equipping of vessels in our ports by any of the powers at war, for military service, was unlawful; and no such vessel was entitled to an asylum in our ports.*

No vessel thus equipped was entitled to an asylum in the ports of the nation whose neutrality had been violated. The Tribunal will not fail to observe that these principles were applied by President Washington to cruisers even of an independent nation, recognized as a sovereign. It was the cruisers of France that were under consideration. But the propositions of this special argument, and the course actually pursued by Great Britain in according its homage to their flag, placed these insurgent cruisers on a much higher and more inviolable position than it is possible to concede to cruisers of a recognized sovereign. In truth, such treatment accorded to such cruisers all the irresponsibility of pirates, and all the sanctity of public ships of a recognized sovereignty. It accorded the irresponsibility of pirates, because *they* were exempted from all control, and there was no Government behind them to be made responsible for them, to be resorted to for their correction or restraint, and to meet the resentments of the offended neutrals in the shape of non-intercourse, of reprisals, or of war.

The action of Great Britain, under this doctrine of comity and notice, as applied to the cruisers of this belligerency, really exempted them, from the beginning to the end of their careers on the ocean, from all responsibility whatever. How long could such conduct toward Great Britain, in violation of her neutrality, as was practiced by this belligerent, how long could such violations of the neutrality of Great Britain have been exercised by belligerent France without remonstrance, and if that remonstrance were unheeded, without reprisals, followed finally by war? Why was not such recourse taken in respect to these cruisers, to the power behind them? There was no power behind them.

I ask, also, in this connection, attention to 1 Phillimore, pp. 399 to 404, and, especially, to a passage extracted from the case of the Santissima Trinidad, commenting upon the case of the Exchange, which last case is cited at considerable length in the argument of the eminent Counsel.

Now the Exchange settles nothing, except that when the political authority of a Government has recognized belligerency, the courts will not exercise jurisdiction over the vessels although sovereignty has not been conceded as well.

The only case in the history of our country in which the political authority was called upon to deal with a cruiser that had derived its origin in violation of our neutrality was the case of a public ship of France, the Cassius, originally Les Jumeaux. The legal report of this case is copied in full in the Appendix of the British Case. It never came to any other determination than that France, the recognized Government of France, was the sponsor for the Cassius, and it was on the respect shown to a sovereign as well as a public belligerent that the disposition of the case, exempting the vessel from judicial process, was made.

Sir ROUNDELL PALMER. "The vessel was restored."

Mr. EVARTS. But it was only after her character as a war-vessel had ceased.

Sir ROUNDELL PALMER. "It was the Government of the United States, by its executive power, that directed the ship to be restored."

Mr. EVARTS. A detailed history of this case, legal and political, will be found in vol. vii of the American Appendix, pp. 18 to 23, in Mr. Dana's valuable note.

It will there be seen that the occasion for our Government to determine its political or executive action never arose until after the determination of the judicial proceedings and until after the vessel had been thrown up by the French Minister, who abandoned her to the United States Government, nor until after she was a worthless hulk.

Sir ROUNDELL PALMER. "Am I not right in saying that the President of the Executive Government of the United States gave notice to the French Minister that the ship was at his disposal?"

Mr. EVARTS. After it had been abandoned, after it had ceased to be a cruiser capable of hostilities, and after the opportunity for its further hostilities had ceased.

Lord TENTERDEN. "But the war still continued."

Mr. EVARTS. But, I mean, after the hostilities of that vessel came to an end.

And permit me to say that this condition of things between the United States and France, during the administration of the first President Adams, came substantially to a war between the two countries.[1]

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[1] A passage from Mr. Dana's note, already referred to, puts this matter in a very clear light.

As the Cassius was taken into judicial custody, within twenty-four hours of her arrival, and remained in that custody until after she had been disarmed and dismantled by the French Minister, and formally abandoned by him to the United States Government with a reclamation for damages, the political department of the United States Government never had practically before it the question, what it would do with an armed foreign vessel of war within its control, which had, on a previous voyage, before it became a vessel of war, and while it was a private vessel of French citizens, added warlike equipments to itself within our ports, in violation of our statutes for the preservation of our neutrality. When it came out of judicial custody, it was a stripped, deteriorated, and abandoned hulk, and was sold as such by public auction. The only political action of our Government consisted in this: It refused to interfere to take the vessel from the custody of the judiciary, but instructed its attorney to see that the fact of its being a *bona fide* vessel of war be proved and brought to the attention of the court, with a motion for its discharge from arrest on the ground of its exemption as a public ship, if it turned out to be so. What course the Executive would have taken as to the vessel, if it had passed out of judicial custody before it was abandoned and dismantled, does not, of course, appear. And that is the only question of interest to international law.—*VII American Appendix*, p. 23; *Choix de Pieces, etc.*, t. ii, p. 726.

The applicability of the rule to the Georgia and the Shenandoah.

Now, it is said that the application of this second clause of the first Rule of the Treaty, and this demand that detention or exclusion shall be exercised in respect to cruisers on their subsequent visits to ports, do not apply either to the Georgia or Shenandoah, because neither the Georgia nor the Shenandoah received their original outfit by violation of the territory of Great Britain, not even in the view of what would be such a violation taken by the United States. I understand that to be the position. I will not discuss the facts of the Georgia and Shenandoah any more than of any other vessel in this regard. If the Shenandoah and Georgia, in the conclusions that you shall arrive at upon the facts concerning their outfit, shall be pronounced in their original evasion not to involve culpability on the part of Great Britain, and not to involve violation of Great Britain's territory on the part of either of these cruisers——

Sir ALEXANDER COCKBURN. "Suppose, Mr. Evarts, that the departure was of such a nature as not to involve Great Britain in any culpability, for want of due diligence, still there certainly is a violation of territory."

Mr. EVARTS. That is the point I was coming to, and of that I entertain no doubt.

You must find upon the facts that there was no evasion from the ports of Great Britain by either of those vessels under circumstances amounting to a violation of the neutrality of Great Britain (on the part of the vessels and on the part of those who set them forth) before you bring them into the situation where the resentment for a violation of neutrality, which I have insisted upon, was not required to be exhibited.

I am not, however, here to discuss the questions of fact.

I will take up what is made the subject of the third chapter of the special argument, which has reference to coaling and "the base of naval operations" and "military supplies," as prohibited by the second Rule of the Treaty.

The question of coaling is a branch of the greater question of the use of British ports as bases of operations.

The question of "coaling" is one question considered simply under the law of *hospitality* or *asylum* to belligerent vessels in neutral ports, and quite another considered, under given facts and circumstances, as an element in the prescribed use of neutral ports as "*a base of naval operations.*"

At the outset of the discussion of this subject it is said that the British Government dealt fairly and impartially in this matter of coaling with the vessels of the two belligerents, and that the real complaint on the part of the United States is of the *neutrality* which Great Britain had chosen to assume for such impartial dealing between the two belligerents. If that were our complaint it is, certainly, out of place in this controversy, for we are dealing with the conduct of Great Britain in the situation produced by the Queen's Proclamation, and there is here no room for discussion of any grievance on the part of the United States from the public act of Great Britain in issuing that Proclamation. But nothing in the conduct of the argument on our part justifies this suggestion of the eminent Counsel.

On the subject of "*coaling*," it is said that it is not, of itself, a supply of contraband of war or of military aid. *Not of itself.* The grounds and occasions on which we complain of coaling, and the question of fact, whether it has been fairly dealt out as between the belligerents, connect themselves with the larger subject, (which is so fully discussed under this head by the eminent Counsel,) a topic of discussion of which coaling is merely a branch, that is to say, the use of neutral ports and waters for coaling, victualing, repairs, supplies of sails, recruitment of men for navigation, *et cet.* These may or may not be obnoxious to censure under

the law of nations according as they have relation or not with facts and acts which, collectively, make up the use of the neutral ports and waters as "the bases of naval operations" by belligerents. Accordingly, the argument of the eminent Counsel does not stop with so easy a disposition of the subject of coaling, but proceeds to discuss the whole question of base of operations—what it means, what it does not mean, the inconvenience of a loose extension of its meaning; the habit of the United States in dealing with the question both in acts of Government and the practice of its cruisers; the understanding of other nations, giving the instances arising on the correspondence with Brazil on the subject of the Sumter; and produces as a result of this inquiry the conclusion, that it was not the intention of the second Rule of the Treaty *to limit the right of asylum.*

In regard to the special treatment of this subject of coaling provided by the Regulations established by the British Government in 1862, it is urged that they were *voluntary* regulations, that the essence of them was that they should be fairly administered between the parties, and that the rights of asylum or hospitality in this regard should not be exceeded. Now, this brings up the whole question, the use of neutral ports or waters as a "base of naval operations" which is proscribed by the second Rule of the Treaty.

You will observe that while the first Rule applies itself wholly to the particular subject of the illegal outfit of a *vessel* which the neutral had reasonable ground to believe was to be employed to cruise, *et cet.*, or to the detention in port of a *vessel* that was in whole or in part adapted for war—while the injunction and duty of the first Rule are thus limited, and the violation of it, and the responsibility consequent upon such violation, are restricted to those narrow subjects, the proscription of the second Rule is as extensive as the general subject, under the law of nations, of the use of ports and waters of the neutral as the basis of naval operations, or for the renewal or augmentation of military supplies, or the recruitment of men.

The doctrine of asylum considered.

What, then, is the doctrine of hospitality or asylum, and what is the doctrine which prohibits the use (under cover of asylum, under cover of hospitality, or otherwise) of neutral ports and waters as bases of naval operations? It all rests upon the principle that, while a certain degree of protection or refuge, and a certain peaceful and innocent aid, under the stress to which maritime voyages are exposed, are not to be denied, and are not to be impeached as unlawful, yet anything that under its circumstances and in its character is the use of a port or of waters for naval operations is proscribed although it may take the guise, much more if it be an abuse, of the privilege of asylum or hospitality.

There is no difference in principle, in morality, or in duty, between neutrality on land and neutrality at sea. What, then, are the familiar rules of neutrality within the territory of a neutral, in respect to land warfare?

Analogy between the duties of a neutral on land and his duties at sea.

Whenever stress of the enemy, or misfortune, or cowardice, or seeking an advantage of refreshment, carries or drives one of the belligerents or any part of his forces over the frontier into the neutral territory, what is the duty of the neutral? It is to *disarm* the forces and send them into the interior till the war is over. There is to be no *practicing* with this question of neutral territory. The refugees are not compelled by the neutral to face their enemy; they are not delivered up as prisoners of war; they are not surrendered to the immediate stress of war from which they sought

refuge. But from the moment that they come within neutral territory they are to become non-combatants, and they are to end their relations to the war. There are familiar examples of this in the recent history of Europe.

What is the doctrine of the law of nations in regard to *asylum*, or *refuge*, or *hospitality*, in reference to belligerents at sea during war? The words themselves sufficiently indicate it. The French equivalent of "*relâche forcée*" equally describes the only situation in which a neutral recognizes the right of asylum and refuge; not in the sense of shipwreck, I agree, but in the sense in which the circumstances of ordinary navigable capacity to keep the seas, for the purposes of the voyage and the maintenance of the cruise, render the resort of a vessel to a port or ports suitable to, and convenient for, their navigation, under actual and *bona fide* circumstances requiring refuge and asylum.

Limitation of the right of commercial dealings in contraband of war.

There is another topic which needs to be adverted to before I apply the argument. I mean the distinction between *commercial* dealing in the uncombined materials of war and the contribution of such uncombined materials of war, in the service of a belligerent, in making up military and naval operations, by the use of neutral territory as the base of those contributions. What are really commercial transactions in contraband of war are allowed by the practice of the United States and of England equally, and are not understood to be proscribed, *as hostile acts*, by the law of nations, and it is agreed between the two countries that the second Rule is not to be extended to embrace, by any largeness of construction, mere commercial transactions in contraband of war.

Sir ALEXANDER COCKBURN. "Then I understand you to concede that the private subject may deal commercially in what is contraband of war?"

Mr. EVARTS. I will even go further than that and say that commercial dealings or transactions are not proscribed by the law of nations *as violations of neutral territory*, because they are in contraband of war. Therefore I do not need to seek any aid in my present purpose of exhibiting the transactions under the second Rule by these cruisers, as using Great Britain as the base for these naval operations, from any construction of that rule which would proscribe a mere commercial dealing in what is understood to be contraband of war. Such is not the true sense of the article, nor does the law of nations proscribe this commercial dealing as a hostile act. But whenever the neutral ports, places, and markets are really used as the bases of naval operations, when the circumstances show that resort and that relation and that direct and efficient contribution and that complicity and that origin and authorship, which exhibit the belligerent himself, drawing military supplies for the purpose of his naval operations from neutral ports, *that* is a use by a belligerent of neutral ports and waters as a base of his naval operations, and is prohibited by the second Rule of the Treaty. Undoubtedly the inculpation of a neutral for permitting this use turns upon the question whether due diligence has been used to prevent it.

Use of a neutral port as a base of hostile operations: what it is.

The argument upon the other side is that the meaning of "the base of operations," as it has been understood in authorities relied upon by both nations, does not permit the resort to such neutral ports and waters for the purpose of specific hostile acts, but proceeds no further. The illustrative instances given by Lord Stowell or by Chancellor Kent in support of the rule are adduced as being the measure of the rule. These examples are of this nature: A vessel cannot make an ambush

for itself in neutral waters, cannot lie at the mouth of a neutral river to sally out to seize its prey, cannot lie within neutral waters and send its boats to make captures outside their limits. All these things are proscribed. But they are given as instances, not of *flagrant*, but of *incidental* and *limited* use. They are the cases that the commentators cite to show that even casual, temporary, and limited experiments of this kind are not allowed, and that they are followed by all the definite consequences of an offense to neutrality and of displeasure to a neutral, to wit, the resort by such neutral power to the necessary methods to punish and redress these violations of neutral territory.

Now let us see how we may, by examples, contrast the asylum or hospitality in matter of coal or similar contributions in aid of navigable capacity, with the use of neutral ports as a base of naval operations.

I will not trespass upon a discussion of questions of fact. The facts are wholly within your judgment, and are not embraced in the present argument. But take the coaling of the Nashville. The Nashville left Charleston under circumstances not in dispute, and I am not now considering whether Great Britain is or is not responsible in reference to that ship in any other matter than that of coaling, which I will immediately introduce to your attention. In the case of the Nashville.

The Nashville having a project of a voyage from Charleston, her home port, to Great Britain, in the course of which she proposed to make such captures as might be, intended originally to carry out Mason and Slidell, but abandoned this last intention before sailing, as exposing these Commissioners to unfavorable hazard from the blockading squadron. This was the project of her voyage, those the naval operations which she proposed to herself. How did she prepare within her own territory, to execute that project of naval warfare? She relied substantially upon steam, and in order to be sure of going over the bar, under circumstances which might give the best chance of eluding the vigilance of the blockaders, she took only two days' supply of coal, which would carry her to Bermuda. The coal was exhausted when she got there; she there took in six hundred tons.

Sir ALEXANDER COCKBURN. "I believe, Mr. Evarts, that the figure six afterward came down to five."

Mr. EVARTS. For the purpose of my present argument, it is quite immaterial.

MR. WAITE. "It was subsequently proved to be four hundred and fifty tons."

Mr. EVARTS. Very well. She had no coal, and she took four hundred and fifty tons or more on board to execute the naval operation which she projected when she left Charleston and did not take the means to accomplish, but relied upon getting them in a neutrel port to enable her to pursue her cruise. Now, the doctrine of *relâche forcée*, or of refuge, or of asylum, or of hospitality, has nothing to do with a transaction of that kind. The vessel comes out of a port of safety at home, with a supply from the resources of the belligerent that will only carry it to a neutral port, to take in *there* the means of accomplishing its projected naval operations. And no system of relief in distress, or of allowing supply of the means of taking the seas for a voyage interrupted by the exhaustion of the resources originally provided, have anything to do with a case of this kind. It was a deliberate plan, when the naval operation was meditated and concluded upon, *to use the neutral port as a base of naval operations*, which plan was carried out by the actual use of neutral territory as proposed.

Now we say, that if this Tribunal, upon the facts of that case, shall

find that this neutral port of Bermuda was planned and used as the base of the naval operations, projected at the start of the vessel from Charleston, that *that* is the use of a neutral port as a base for naval operations. On what principle is it not? It is true that the distance of the projected naval operation, or its continuance, makes a difference *in principle* as to the resort to establish a base in neutral territory or to obtain supplies from such a base? Why, certainly not. Why, that would be to proscribe the slight and comparatively harmless abuses of neutral territory, and to permit the bold, impudent, and permanent application of neutral territory to belligerent operations. I will not delay any further upon this illustration.

In the case of the Shenandoah.

Let us take next the case of the Shenandoah, separating it from any inquiries as to culpable escape or evasion from the original port of Liverpool. The project of the Shenandoah's voyage is known. It was formed within the Confederate territory. It was that the vessel should be armed and supplied, that she should make a circuit, passing round Cape Horn or the Cape of Good Hope, that she should put herself on reaching the proper longitude in a position to pursue her cruise to the Arctic Ocean, there to make a prey of the whaling fleet of the United States. To break up these whaling operations and destroy the fleet was planned under motives and for advantages which seemed to that belligerent to justify the expense, and risk, and perils of the undertaking. That is the naval operation, and all that was done *inside the belligerent territory* was to form the project of the naval operation and to communicate authority to execute it to the officers who were outside of that territory.

Now, either the Shenandoah, if she was to be obtained, prepared, armed, furnished, and coaled for that extensive naval operation, was to have no base for it at all, or it was to find a base for it in neutral ports.

It is not a phantom ship, and it must have a base. Accordingly, as matter of fact, all that went to make up the execution of that operation of maritime war was derived from the neutral ports of Great Britain. The ship was thence delivered and sallied forth——

Sir ALEXANDER COCKBURN. "But that was not known to the Government."

Mr. EVARTS. I am now only showing that this occurred as *matter of fact.* The question whether it was known to or permitted by the Government of Great Britain, as the Chief Justice suggests, is of an entirely different aspect, involving the considerations of due diligence to prevent.

The ship, then, was furnished from neutral ports and waters. It resorted to Madeira to await the arrival of the Laurel, which, by concert and employment in advance of the sailing of the Shenandoah, was to take the armament, munitions of war, officers, and a part of the crew to complete the Shenandoah's fitness to take the seas as a ship of war to execute the naval project on which she originally sailed, and which were transferred from ship to ship at sea. The island of Madeira served only as rendezvous for the two vessels, and if there had been occasion, as in fact there was not, might have furnished shelter from storms. Thus made a fighting-ship from these neutral ports, as a base, and furnished from the same base with the complete material for the naval operation projected, the Shenandoah made captures, as without interruption of her main project she might, rounded the Cape of Good Hope and came to Melbourne, another British port, whence she was to take her last departure for her distant field of operations, the waters of the whaling fleet of the United States in the Arctic Ocean.

Sir ROUNDELL PALMER. "I did not, Mr. Evarts, enter upon a treatment of each of the vessels."

Mr. EVARTS. I am only showing that this ship did use your ports for the purposes of its operations.

Sir ROUNDELL PALMER. "But, Mr. Evarts, I only mentioned these vessels."

Mr. EVARTS. You discussed the question of base of naval operations. There she obtained as matter of fact four hundred and fifty tons of coal, or something of that kind, and forty men, and without both of these, as well as important repairs of her machinery, she could not have carried out the naval project on which she had started. The coal taken at Melbourne was sent by appointment from Liverpool, and was there to complete her refitment. The naval operation would have failed if the vessel had not received the replenishment of power and resources at Melbourne as a base. Now, this Shenandoah was able to sail sixteen knots an hour.

Sir ALEXANDER COCKBURN. "Do you mean to say sixteen knots an hour? That is faster than any vessel I have ever heard of."

Mr. EVARTS. Well, we will not dispute about the facts. There is no doubt, however, that it is so—she sailed on one occasion over three hundred and twenty miles in twenty-four hours.

Lord TENTERDEN. "But that is not sixteen knots an hour."

Mr. EVARTS. I have not said that she had sailed twenty-four consecutive hours at the rate of sixteen knots. But she *could* sail sixteen knots an hour, and she could only steam ten knots an hour. I have not invented this. Her remarkable qualities are stated in the proofs. Her steam-power was not necessary to her navigation or her speed, however, except to provide against calms, and give assurance of constancy of progress in adverse weather. Her great advantage, however, was in being one of the fastest sailing ships ever built. The great importance of her having abundance of coal at the contemplated scene of her naval operations was, that she might capture these poor whalers, who understood those perilous seas, and if they could only get up steerage way, would be able to elude her.

Sir ALEXANDER COCKBURN. "What! if she sailed sixteen knots an hour!"

Mr. EVARTS. If the Chief Justice will mark the circumstances of Arctic navigation, he will understand that, by means of their knowledge of the ice and the region generally, they could seek shelter by interposing barriers between themselves and their pursuer. They did, however, become her prey; but it was only when she found them becalmed. Now, this case of the Shenandoah illustrates by its career, on a large scale, the project of a belligerent in maritime war, which sets forth a vessel and furnishes it complete for war, plans its naval operations and executes them, and all this *from neutral ports and waters as the only base, and as a sufficient base.* Melbourne was the only port from which the Shenandoah received anything after its first supply from the home ports of Great Britain, and it finally accomplished the main operation of its naval warfare by means of the *coaling* and other refitment at Melbourne. Whether it could rely for the origin of its naval power, and for the means of accomplishing its naval warfare, upon the use of neutral ports and waters, under the cover of commercial dealings in contraband of war, and under the cover of the privilege of asylum, was the question which it proposed to itself, and which it answered for itself. It is under the application of these principles that the case of the Shenandoah is supposed to be protected from being a violation of the law of nations,

which prohibits the use of ports and waters of a neutral as a base of naval operations. I do not propose to argue upon the facts of the case of the Shenandoah, but only to submit the *principles* on which they are to be considered.

Sir ALEXANDER COCKBURN. "I would like to ask you, Mr. Evarts, whether your proposition involves this: That every time a belligerent steam-vessel puts into a neutral port for the purpose of getting coal, and then goes forward upon her further object of war, that there is a violation of neutral territory. I just want to draw your attention to this point. What I want to understand is, what difference there is between the ships of one nation and the ships of another nation, as regards this matter of coal. Would the principle of your argument apply to the vessels of other belligerents?"

Mr. EVARTS. Of course it is to be applied to all belligerents; and when the case arises for complaint, it is to be judged in view of all the facts and circumstances, whether it falls within the license of hospitality, or whether it is a resort as to a base of operations—that is to say, whether the whole transaction, in all its features, amounts to a concerted and planned use.

Sir ALEXANDER COCKBURN. "Planned by whom?"

Mr. EVARTS. Why, planned by the belligerent.

Sir ALEXANDER COCKBURN. "A ship goes into a neutral port without intimating its purpose or disclosing whether it belongs to one belligerent or another."

Mr. EVARTS. Take the case of the Nashville.

Lord TENTERDEN. "Take the Vanderbilt."

Sir ALEXANDER COCKBURN. "Well, let us take that case. She goes into a neutral port, and wants coal for the purpose of going forth again on her mission of war; no question is asked. The ship, I grant you, comes with the object of getting coal for the purpose of going out on her errand of war, and, in one sense, uses neutral territory as a base. But the neutral knows nothing about the course of the vessel or its destination, except he takes it for granted it is a ship of war. How can he be said to *allow* the territory to be made a base of operations, except so far as it applies to the ships of a belligerent?"

Mr. EVARTS. It does apply, but I have not said that this alone rendered the *neutral responsible;* I have merely laid down the facts. The magnitude of the operations, and the completeness of their relations to the base of supplies, do not alter the application of principles. After all there is left, of course, the question of whether *you have suffered or allowed* these things, or *have used due diligence to prevent* them, and upon the discussion of that subject I shall not trespass.

The question of the use of the neutral port as a base of operations being established, there remains the inquiry whether the neutral did or did not exercise due diligence to prevent it.

Sir ALEXANDER COCKBURN. "But that is the very question."

Mr. EVARTS. But *that* question could not arise until it was determined whether the belligerent had, *as matter of fact,* made the neutral port a base of operations. All that I have said has been intended to show that what was done by these cruisers did make the neutral ports a base, just as much as if a shallop was stationed at the mouth of a neutral river, and sent out a boat to commit hostilities. In either case, the neutral is not responsible, unless it has failed to exercise due diligence. But there is this further consequence carrying responsibility, that when the neutral does not know of such an act until after it has been committed, it is its duty to resent it and to prevent its repetition, and to deny hospitality to the vessels that have consummated it. Now, these questions can certainly be kept distinct. If the fact is not known, and if there is no

want of due diligence, then the neutral is not in fault; if the facts are afterward known, then the cruiser that has committed the violation of neutrality is to be proscribed, to be denied hospitality, to be detained in port, or excluded from port, after notice, or without notice, as the case may be.

The question then arises whether a nation thus dealt with by a belligerent, and having the power to stop the course of naval operations thus based, if it purposely omits so to do, does not make itself responsible for their continuance. I do not desire to be drawn into a discussion upon the facts which are not included in the range of the present argument. I now am simply endeavoring to show that the *illustrations* of Kent and Stowell, taken from navigation and maritime war then prevailing, do not furnish the *rule* or the *limit* of the responsibility of neutrals in respect of allowing such use of naval bases, nor of the circumstances which make up the prohibited uses of neutral ports for such bases.

I proceed to another branch of the subject.[1]

It is said that the concerted setting forth of the Laurel from the neutral port, to carry the armament and the munitions of war and the officers and the crew to be combined outside the neutral jurisdiction with the Shenandoah, already issued from another port of the same neutral, is only *a dealing in contraband of war*. I deny that such a transaction has any connection with dealing in contraband of war. It is a direct obtaining by a projected cruiser of its supply of armament, munitions, and men and officers from a neutral port.

Such proceedings are not mere dealing in contraband of war.

There may be no fault on the part of the neutral in not preventing it. That will depend on the question of "due diligence to prevent," "reasonable ground to believe," &c., &c. But the principle of contraband of war does not protect such a transaction, and *that* is the only principle that has been appealed to by the British Government in the discussions of this matter to justify it. The facts of this vessel going out were known——

Sir ALEXANDER COCKBURN. "Not until afterwards."

Mr. EVARTS. The law of nations was violated, your territory had been used, as matter of fact, we claim, as the base of naval operations, and it was not a dealing in contraband of war. It was not a commercial transaction. It was a direct furnishing of a cruiser with armament from your port. It might as well have been accomplished within three miles of your coast. Yet, it is said this is no offense against your law.

Sir ALEXANDER COCKBURN. "I do not say that."

Mr. EVARTS. Unfortunately for the United States, through the whole war, we had quite other doctrine from those who laid down the law for Great Britain in these matters. Fortunately, we have better doctrine here and now. But according to the law as administered in England such combinations of the materials of naval war could be made outside of her ports, by the direct action of the belligerent Government, deriv-

[1] In connection with this discussion, I ask attention to the course taken by the Government of Brazil in resentment and punishment for the incidental violation of its neutrality by the Florida, (within the neutral waters,) and by the Shenandoah, by her commander violating the Consular seal of Brazil on board one of the Shenandoah's prizes. In both instances, the offending cruisers were perpetually excluded from the ports of the empire; and the exclusion embraced any other cruiser that should be commanded by the captain of the Shenandoah.

The treatment of the Rappahannock by the French Government, which detained her in port till the close of the war, is well worthy of attention. The transaction is detailed in the App. Am. Counter Case, pp. 917–946.

ing all the materials from her ports and planning thus to combine them outside.

Sir ALEXANDER COCKBURN. "If that had been shown."

Mr. EVARTS. The proofs do show it, and that the doctrine was that it was lawful and should not be interfered with.

I disclaim any desire or purpose of arguing upon the facts of particular vessels. I am merely laying down principles applicable to supposed facts. If the principles were conceded I would have no occasion to deal with questions of fact at all.

The learned Chief Justice has very satisfactorily, certainly to us, presently expressed certain legal opinions on this subject; but I must say that they were not entertained by the Government of Great Britain and did not control its action.

I think that the proofs before the Tribunal can be easily referred to to confirm the position I have taken as to the legal doctrine held in England in reference to this subject of the base of operations. In contradiction of that doctrine we now insist, as our Government all through the war insisted, this is not dealing in contraband of war; it *is* using neutral territory as a base of operations. Whether there was or should be no responsibility for it, because it was not known or could not be prevented, is an entirely different question. But I undertake to say, as matter of fact, that the doctrine of the English law during all those proceedings was that such projects and their execution as a contributory concurrence with the outfit of the principal cruisers for naval operations (such cases as those of the Laurel, the Alar, the Agrippina, the Bahama, and similar vessels) were *lawful*, and could not and should not be prevented.

Sir ALEXANDER COCKBURN. "I would be very much obliged if you will refer me to some authority for that."

Mr. EVARTS. I will. One of the arbitrators, (Mr. Adams,) from his knowledge of the course of the correspondence, knows that I do not deceive myself in that respect. It is this contributory furnishing of armament and munitions and men which rendered the principal cruisers efficient instruments of all the mischief, and without which their evasions from port were of little consequence, and without the expectation of which they never would have been planned.

I now refer to a paper that will show that I have been right in my proposition as to the construction of English law as held during the occurrence of these transactions.

In vol. iii of American Appendix, (p. 53,) in a report to the Board of Trade by the Commissioners of Customs, occurs this passage:

CUSTOM HOUSE, *September* 25, 1862.

Your lordships having, by Mr. Arbuthnot's letter of the 16th instant, transmitted to us, with reference to Mr. Hamilton's letter of the 2d ultimo, the inclosed communication from the Foreign Office, with copies of a further letter and its inclosures from the United States Minister at this Court, respecting the supply of cannon and munitions of war to the gun-boat No. 290, recently built at Liverpool, and now in the service of the so-called Confederate States of America; and your lordships having desired that we would take such steps as might seem to be required in view of the facts therein represented, and report the result to your lordships, we have now to report:

That, assuming the statement set forth in the affidavit of Reddin, (who sailed from Liverpool in the vessel,) which accompanied Mr. Adams's letter to Earl Russell, to be correct, the furnishing of arms, &c., to the gun-boat does not appear to have taken place in any part of the United Kingdom or of Her Majesty's dominions, but in or near Angra Bay, part of the Azores, part of the Portuguese dominions. No offense, therefore, cognizable by the laws of this country, appears to have been committed by the parties engaged in the transaction alluded to in the affidavit.

From Lord Russell's communication of this Report to the American

Minister, it will be seen that the accepted opinion of the Government was, that such operations could not be interfered with, and therefore would not be interfered with. That may be a correct view of the Foreign-Enlistment Act of Great Britain, and hence the importance of reducing the obligations of a neutral nation to prevent violations of international law to some settled meaning.

This was done by convention between the High Contracting Parties, and appears in the Rules of the Treaty. Under these Rules is to be maintained the inculpation which we bring against Great Britain, and which I have now discussed, because the subject is treated in the special argument to which I am replying. The instances of neutral default announced under the second Rule are made penal by the law of nations. They are proscribed by the second Rule. They are not protected as dealings in contraband of war. They are not protected under the right of asylum. They are uses of neutral ports and waters as bases of naval operations, and if not prohibited by the Foreign-Enlistment Act, and if the British Executive Government could not and would not prevent them, and that was the limit of their duty under their Foreign-Enlistment Act, still we come *here* for judgment, whether a nation is not responsible that deals thus in the contribution of military supplies, that suffers ship after ship to go on these errands, makes no effort to stop them, but, on the contrary, announces, as the result of the deliberation of the Law-Officers, to the subordinate officials, to the Minister of the United States, to all the world, that these things are *not* prohibited by the law of Great Britain, and cannot be prohibited by the Executive Government, and therefore cannot and will not be stopped. That this was the doctrine of the English Government will be seen from a letter dated the 2d of April, 1863, of Lord Russell, found, in part, in vol. ii, American Appendix, p. 404; and, in part, in vol. i, *ibid.*, p. 590:

> But the question really is, has there been any act done in England both contrary to the obligations of neutrality as recognized by Great Britain and the United States, *and capable of being made the subject of a criminal prosecution?* I can only repeat that, in the opinion of Her Majesty's Government, no such act is specified in the papers which you have submitted to me.
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> I, however, willingly assure you that, in view of the statements contained in the intercepted correspondence, Her Majesty's Government have *renewed* the instructions already given to the custom-house authorities of the several British ports where ships of war may be constructed, and by the Secretary of State for the Home Department to various authorities with whom he is in communication, to endeavor to discover and obtain legal evidence of any violation of the Foreign-Enlistment Act, with a view to the strict enforcement of that statute whenever it can really be shown to be infringed.
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> * * * * * * *
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> It seems clear, on the principle enunciated in these authorities, that, except on the ground of any proved violation of the Foreign-Enlistment Act, Her Majesty's Government cannot interfere with commercial dealings between British subjects and the so-styled Confederate States, whether the subject of those dealings be money or contraband goods, or even ships adapted for warlike purposes.

These were instances in which complaints were made of these transactions, and in which it was answered that the British Government charged itself with no duty of due diligence, with no duty of remonstrance, with no duty of prevention or denunciation, but simply with municipal prosecutions for crimes against the Foreign-Enlistment Act.

What I have said of the Shenandoah, distinguished her from the Florida, and the Alabama, and the Georgia, only in the fact that, from the beginning to the end of the Shenandoah's career, she had *no* port of any kind, and had *no* base of any kind, except the ports of the single nation of Great Britain. But as to the Florida and the Alabama, one

(the Alabama) was supplied by a tug, or steamer, that took out her armament to Angra Bay, the place of her first resort; the other (the Florida) was supplied by a vessel sent out to Nassau to meet her, carrying all her armament and munitions of war, and which she took out in tow, transshipping her freight of war-material outside the line of neutral waters.

That is called dealing in contraband, not proscribed by the law of nations, not proscribed by any municipal law, and not involving any duty of Great Britain to intercept, to discourage or denounce it. That is confounding substance with form. But let me use the language of an Attorney-General of England, employed in the Parliamentary discussions which attended the enactment of the Foreign-Enlistment Act of 1819.

From this debate in Parliament, it will be seen what the principal law-adviser of the Crown *then* thought of carrying on war by "*commercial transactions*:"

Such an enactment [he said] was required by every principle of justice; for when the State says, "We will have nothing to do with the war waged between two separate powers," and the subjects in opposition to it say, "We will, however, interfere in it," surely the House would see the necessity of enacting some penal statutes to prevent them from doing so; unless, indeed, it was to be contended that the State, and the subjects who composed that State, might take distinct and opposite sides in the quarrel. He should now allude to the petitions which had that evening been presented to the House against the bill; and here he could not but observe, that they had either totally misunderstood or else totally misrepresented its intended object. They had stated that it was calculated to check the commercial transactions and to injure the commercial interests of this country. If by the words "commercial interests and commercial transactions" were meant "warlike adventures," he allowed that it would; but if it were intended to argue that it would diminish a fair and legal and pacific commerce, he must enter his protest against any such doctrines. Now, he maintained, *that as war was actually carried on against Spain by what the petitioners called "commercial transactions," it was the duty of the House to check and injure them as speedily as possible.*—(*Note B, American Argument*, p. 231; *Fr. tr. Appendice*, p. 488.)

War against the United States, maritime war, was carried on under cover of what was called right of asylum and commercial transactions in contraband of war. We are now under the law of nations, by virtue of this second Rule, which says that the use of "ports and waters as the base of naval operations, or for the purpose of the renewal or augmentation of military supplies or arms or the recruitment of men," shall not be allowed, and if the *facts* of such dealing shall be found, and the proof of due diligence to prevent them shall not appear in the proofs, under that second Rule all four of these cruisers must be condemned by the Tribunal.

I do not pass, nor venture to pass, in the present argument, upon the question whether there has been in this matter a lack of due diligence. In the discussion of my learned friend every one of these instances is regarded as a case not within the second Rule, and as a simple dealing in contraband of war.

Sir ROUNDELL PALMER. "I must be permitted to say that I have not felt myself at liberty to go into a discussion of individual cases."

Mr. EVARTS. The vessels are treated in the argument of the learned Counsel.

Sir ROUNDELL PALMER. "There may be passages in reference to some of the principal topics which have been mentioned, but I have avoided entering upon any elaborate consideration of each particular vessel. There is no distinct enumeration of the vessels."

Mr. EVARTS. There is, so distinct as this :it is expressly stated that under the law neither the Georgia, nor the Shenandoah, nor the subsidiary vessels that carried their armaments to the Georgia and Shenan-

doah and to the Florida and Alabama, had, in so doing, committed a breach of neutrality.

I am arguing now under the second Rule. I have not felt that I was transcending the proper limits of this debate, because, in answer to the special argument of the eminent Counsel, I have argued in this way. My own view as to the extension of the argument of the learned Counsel in his discussion of what is called "due diligence," as a doctrine of the law of nations, would not have inclined me to expect so large a field of discussion as he covered. But, as I have admitted in my introductory remarks, the question of due diligence connects itself with the measure of duty and the manner in which it was performed, and I felt no difficulty in thinking that the line could not be very distinctly drawn.

I have undertaken to argue this question under a state of facts, which shows that a whole naval project is supplied, from the first outfit of the cruiser to the final end of the cruise, by means of this sort of connection with neutral ports and waters as a base of naval operations; and I have insisted that such naval operations are not excluded from the proscription of the second Rule, by what is claimed in the argument of the learned Counsel as the doctrine of contraband of war and the doctrine of asylum.

At the Conference of the Tribunal, held on the 6th day of August, Mr. Evarts continued as follows:

Statement of the British argument on this point.

I was upon the point of the doctrine of the British Government, and its action under that doctrine, as bearing upon the outfit of the contributory provisions of armament, munitions, and men, set forth in such vessels as the Bahama, the Alar, and Laurel. The correspondence is full of evidence that I was correct in my statement of the doctrine of the British Government, and of its action from beginning to end being controlled by that doctrine; and all the remonstrances of the United States were met by the answer that the law of nations, the Foreign-Enlistment Act, the duty of neutrality, had nothing whatever to do with that subject, as it was simply dealing in contraband of war. The importance of this view, of course, and its immense influence in producing the present controversy between the two nations, are obvious. The whole mischief was wrought by the co-operating force of the two legal propositions: (1.) That the *unarmed* cruiser was not itself a weapon of war, an instrument of war, and, therefore, was not to be intercepted as committing a violation of the law of nations; and, (2.) That the contributory provision by means of her supply-ships, of her armament, munitions, and men, to make her a complete instrument of naval hostilities, was also not a violation of the law of nations, but simply a commercial dealing in contraband. It was only under those combined doctrines that the cruiser ever came to be in the position of an instrument of offensive and defensive war, and to be able to assume the "commission" prepared for her, and which was *thenceforth* to protect her from interference on the doctrine of comity to sovereignty.

So, too, it will be found, when we come to consider the observations of the eminent Counsel on the subject of due diligence, to which I shall have occasion soon to reply, that the question whether these were *hostile acts*, under the law of nations, was the turning point in the doctrine of the Government of Great Britain, and of its action, as to whether it would intercept these enterprises by the exercise of executive power, as

a neutral government would intercept anything in the nature of a hostile act under the law of nations. The doctrine was that these were not hostile acts *separately*, and that no hostile act arose unless these separate contributions were combined in the ports of Great Britain; that there was no footing otherwise for the obligation of the law of nations to establish itself upon; that there was no remissness of duty on the part of the neutral in respect of them; and finally that these operations were not violations of the Foreign-Enlistment Act. All this is shown by the whole correspondence, and by the decisions of the municipal courts of England, in regard to the only question passed upon at all, that of *unarmed* vessels, so far as they ever passed even upon that question.

It has seemed to be intimated by observations which the learned Counsel has done me the honor to make during my present consideration of this topic, that my argument has transcended the proper limit of reply to the special argument which the eminent Counsel himself has made on the same topic. A reference to the text of that argument will, I think, set this question at rest.

In the fifteenth section of the first chapter of his argument, he does us the honor to quote certain observations in our principal Argument to which he proposes to reply. He quotes, at page 17 of his argument, as follows:

> (2.) The next great failure of Great Britain "to use due diligence to prevent" the violation of its neutrality, in the matters within the jurisdiction of the Tribunal, is shown in its entire omission to exert the direct executive authority, lodged in the Royal Prerogative, to intercept the preparations and outfits of the offending vessels, and the contributory provisions, of armament, munitions and men, which were emitted from various ports of the United Kingdom. We do not find in the British Case or Counter Case, any serious contention, but that such powers as pertain to the Prerogative, in the maintenance of international relations, and are exercised as such by other great powers, would have prevented the escape of every one of the offending vessels emitted from British ports, and precluded the subsidiary aids of warlike equipment and supplies which set them forth, and kept them on foot, for the maritime hostilities which they maintained.[1]

The comment of the learned Counsel upon this passage is found on the same page (17) of his argument, as follows:

> With respect to the second passage, it is to be observed, that it not only imputes as a want of due diligence, the abstinence from the use of arbitrary power to supply a supposed deficiency of legal powers, but it assumes that the United States had a right, by international law, to request Great Britain to prevent the exportation from her territory of what it describes as "contributory provisions," arms, munitions, and "subsidiary aids of warlike equipment and supplies," though such elements of armament were uncombined, and were not destined to be combined, within British jurisdiction, but were exported from that territory under the conditions of ordinary exports of articles contraband of war. For such a pretension no warrant can be found, either in international law, or in any municipal law of Great Britain, or in any one of the Three Rules contained in the sixth Article of the Treaty of Washington.

I respectfully submit, therefore, that in the observations I have had the honor to make upon this subject, I can hardly be said to have exceeded the due limits of an argument in reply. I fail to find, in what the eminent Counsel here advances in behalf of his Government, any answer to my assertion that, during the whole course of the war, (a period when he, as Solicitor-General or as Attorney-General of England, was one of the law-advisers of the Government,) the action of Great Britain was governed by the doctrine which I have stated. This was

[1] An error has occurred in the French translation of this passage of the American Argument. In the fifteenth and sixteenth lines of page 343, the words "l'armement de navires hostiles et les fournitures de vivres," should read, "l'equipment de navires hostiles, et les fournitures subsidiaires."

publicly announced and it was so understood by the rebel agents, by the interests involved in these maritime hostilities, by the United States Minister, by the officials of the British Government, by everybody who had to act, or ask for action, in the premises.

The first instance arising was of the vessel that carried out the armament and munitions for the Alabama, and the answer was as I read from the report of the Commissioners of Customs to the Board of Trade. This official paper stated that the Commissioners found nothing in that affair that touched the obligations of Great Britain. This was communicated to Mr. Adams, and that, thenceforth, was the doctrine and action of the Government of Great Britain.

The view of an eminent publicist on this point, as a question of international law, may be seen from an extract found at page 177 of the Case of the United States. M. Rolin-Jacquemyns says:

Il nous semble que l'adoption d'une pareille proposition équivaudrait à l'inclination d'un moyen facile d'éluder la règle qui déclare incompatible avec la neutralité d'un pays l'organisation, sur son territoire d'expéditions militaires au service d'un des belligérants. Il suffira, s'il s'agit d'une entreprise maritime, de faire partir en deux ou trois fois les élements qui la constituent; d'abord le vaisseau, puis les hommes, puis les armes, et si tous ces éléments ne se rejoignent que hors des eaux de la puissance neutre qui les a laissés partir, la neutralité sera intacte. Nous pensons que cette interprétation de la loi internationale n'est ni raisonable, ni équitable.

It will be, then, for the Tribunal to decide what the law of nations is on this subject. If the Tribunal shall assent to the principles which I have insisted upon, and shall find them to be embraced within the provisions of the three Rules of this Treaty, and that the facts in the case require the application of these principles, it stands admitted that Great Britain has not used and has refused to use any means whatever for the interruption of these contributory provisions of armament and munitions to the offending cruisers.

It is not for me to dispute the ruling of the eminent lawyers of Great Britain upon their Foreign-Enlistment Act; but, for the life of me, I cannot see why the Alar, and the Alabama, and the Laurel, when they sailed from the ports of England with no cargo whatever except the armament and munitions of war of one of these cruisers, and with no errand and no employment except that of the Rebel Government, through its agents, to transport these armaments and munitions to the cruisers which awaited them, were not "transports" in the service of one of the belligerents within the meaning of the Foreign-Enlistment Act of Great Britain. That, however, is a question of municipal law. It is with international law that we are dealing now and here. The whole argument, to escape the consequences which international law visits upon the neutral for its infractions, has been that whatever was blameworthy was so only as an infraction of the municipal law of Great Britain. And when you come to transactions of the kind I am now discussing, as they were not deemed violations of the Foreign-Enlistment Act nor of international law, and as the powers of the Government by force to intercept, though the exercise of prerogative or otherwise did not come into play, the argument is that there were *no consequences whatever* to result from these transactions. They were merely considered as commercial transactions in contraband of war.

The arming and equipping the cruisers was forbidden by the law of nations.

But the moment it is held that these things *were* forbidden by the law of nations, then of course it is no answer to say, you cannot indict anybody for them under the law of Great Britain. Nor does the law of nations, having laid down a duty, and established its violation as a crime, furnish no means of redressing the injury or of correcting or punishing the evil. What course

does it sanction when neutral territory is violated by taking prizes within it? When the prize comes within the jurisdiction of the neutral, he is authorized to take it from the offending belligerent by force and release it. What course does it sanction when a cruiser has been armed within neutral territory? When the vessel comes within the jurisdiction of the neutral he is authorized to disarm it.

They should therefore have been disarmed when they came again within British ports.

Now, our proposition is that these cruisers, thus deriving their force for war by these outfits of tenders with their armament and munitions and men, when brought within the British jurisdiction, should have been *disarmed* because they had been armed, in the sense of the law of nations, by using as a base of their maritime hostilities, or their maritime fitting for hostilities, the ports and waters of this neutral state.

Why, what would be thought of a cruiser of the United States lying off the port of Liverpool, or the port of Ushant in France, and awaiting there the arrival of a tender coming from Liverpool, or from Southampton, by pre-arrangement, with an augmentation of her battery and the supply of her fighting-crew? Would it, because the vessel had not entered the port of Southampton or the port of Liverpool, be less a violation of the law of nations which prohibited the augmentation of the force of a fighting-vessel of any belligerent from the contributions of the ports of the neutral?

The construction of the rules of the Treaty.

The fourth chapter of this special argument is occupied, as I have already suggested, with the consideration of the true interpretation of the rules of the Treaty, under general canons of criticism, and under the light which should be thrown upon their interpretation by the doctrines and practices of nations. I respectfully submit, however, that the only really useful instruction that should be sought, or can be applied, in aid of your interpretation of these rules, if their interpretation needs any aid, is to be drawn from the situation of the parties and the elements of the controversy between them, for the settlement and composition of which these rules were framed; and this Tribunal was created to investigate the facts and to apply the rules to them in its award.

The whole ground of this controversy is expressed in the firmest and most distinct manner by the statesmen on both sides who had charge of the negotiations between the two countries, and who could not misunderstand what were the situation and the field of debate for application to which the high contracting parties framed these rules. And what were they? Why, primarily, it was this very question of the various forms of contributory aid from the neutral ports and waters of Great Britain by which the Confederate navy had been made, by which it was armed, by which it was supplied, by which it was kept on foot, by which, without any base within the belligerent territory, it maintained a maritime war.

Anterior to the negotiation which produced the Treaty, there is this public declaration made by Mr. Gladstone, and cited on page 215 of the Case of the United States, "There is no doubt that Jefferson Davis and other leaders of the South have made an army; *they are making*, it appears, *a navy*."

There is the speech of Lord Russell on the 26th of April, 1864, also cited on the same page:

> It has been usual for a power carrying on war upon the seas to possess ports of its own in which vessels are built, equipped, and fitted, and from which they issue, to which they bring their prizes, and in which those prizes, when brought before a court, are either condemned or restored. But it so happens that in this conflict the Confed-

erate States have no ports except those of the Mersey and of the Clyde, from which they fit out ships to cruise against the Federals; and having no ports to which to bring their prizes, they are obliged to burn them on the high seas.

There is, furthermore, the declaration of Mr. Fish, made as Secretary of State, in his celebrated dispatch of the 25th of September, 1869, in which he distinctly proposes to the British Government, in regard to the claim of the United States in this controversy, that the rebel counsels have made Great Britain "the arsenal, the navy-yard, and the treasury of the insurgent Confederates."

That was the controversy between the two countries, for the solution of which the Rules of this Treaty and the deliberations of this Tribunal were to be called into action; and they are intended to cover, and do cover, *all the forms* in which this use of Great Britain for the means and the opportunities of keeping on foot these maritime hostilities was practiced. The first rule covers all questions of the outfit of the cruisers themselves; the second rule covers all the means by which the neutral ports and waters of Great Britain were used as bases for the rebel maritime operations of these cruisers, and for the provision, the renewal, or the augmentation of their force of armament, munitions, and men. Both nations so agreed. The eminent Counsel for the British Government, in the special argument to which I am now replying, also agrees that the *second* rule, under which the present discussion arises, is conformed to the pre-existing law of nations.

We find, however, in this chapter of the special argument, another introduction of the *retroactive effect*, as it is called, of these Rules as a reason why their interpretation should be different from what might otherwise be insisted upon. This is but a re-appearance of what I have already exposed as a vice in the argument, viz, that these Rules, in respect to the very subject for which they were framed, do not mean the same thing as they are to mean hereafter, when new situations arise for their application. Special methods of criticism, artificial limits of application are resorted to to disparage or distort them as binding and authoritive rules in regard to the past conduct of Great Britain. Why, you might as well tear the Treaty in pieces as to introduce and insist upon any proposition, whether of interpretation or of application, which results in the demand that the very controversy for which they were framed is not really to be governed by the Rules of the Treaty.

The concluding observations of this chapter, that the invitation to other powers to adopt these Rules as binding upon them, contained in the Treaty, should discourage a forced and exaggerated construction of them, I assent to; not so much upon the motive suggested as upon the principle that a forced and exaggerated construction should not be resorted to, upon either side, upon any motive whatever.

Review of Sir R. Palmer's criticism upon the Argument of the United States.

I now come to the more general chapter in the argument of the learned Counsel, the *first* chapter, which presents under forty-three sections a very extensive and very comprehensive, and certainly a very able, criticism upon the main Argument of the United States upon "due diligence," and upon the duties in regard to which due diligence was required, and in regard to the means for the performance of those duties, and the application of this due diligence possessed by Great Britain. Certainly these form a very material portion of the Argument of the United States; and that Argument, as I have said, has been subjected to a very extensive criticism. Referring the Tribunal to our Argument itself as furnishing, at least, what we suppose to be a clear and intelligible view of our propositions of the grounds upon which they rest, of the reasoning which supports them,

of the authorities which sustain them, of their applicability, and of the result which they lead to—the inculpation of Great Britain in the matters now under judgment—we shall yet think it right to pass under review a few of the general topics which are considered in this discussion of "due diligence."

The prerogative of the Crown.

The sections from seven to sixteen, (the earlier sections having been already considered,) are occupied with a discussion of what are supposed to be the views of the American Argument on the subject of prerogative or executive power, as distinguished from the ordinary administration of authority through the instrumentality of courts of justice and their procedure. Although we may not pretend to have as accurate views of constitutional questions pertaining to the nation of Great Britain, or to the general principles of her common law, or of the effect of her statutory regulations, and of her judicial decisions as the eminent Counsel of Her Britannic Majesty, yet I think it will be found that the criticisms upon our Argument in these respects are not, by any means, sound. It is, of course, a matter of the least possible consequence to us, in any position which we occupy, either as a nation before this Tribunal or as lawyers in our Argument, whether or not the sum of the obligations of Great Britain in this behalf under the law of nations was referred for its execution to this or that authority under its constitution, or to this or that official action under its administration. One object of our Argument has been to show that, if the sum of these obligations was not performed, it was a matter of but little importance to us or to this Tribunal, *where*, in the distribution of administrative duty, or *where*, in the constitutional disposition of authority, the defect, either of power or in the due exercise of power, was found to be the guilty cause of the result. Yet, strangely enough, when, in a certain section of our Argument, *that* is laid down as one proposition, we are accused by the learned Counsel of a *petitio principii*, of begging the question, that the sum of her obligations was not performed by Great Britain.

With regard to *prerogative*, the learned Counsel seems to think that the existence of the supposed executive powers under the British Constitution, and which our Argument has assigned to the prerogative of the Crown, savors of arbitrary or despotic power. We have no occasion to go into the history of the prerogative of the British Crown, or to consider through what modifications it has reached its present condition. When a free nation like Great Britain assigns certain functions to be executed by the Crown, there does not seem to be any danger to its liberties from that distribution of authority, when we remember that Parliament has full power to arrange, modify, or curtail the prerogative at its pleasure, and when every instrument of the Crown, in the exercise of the prerogative, is subject to impeachment for its abuse.

The prerogative is trusted under the British Constitution with all the international intercourse of peace and war, with all the duties and responsibilities of changing peace to war, or war to peace, and also in regard to all the international obligations and responsibilities which grow out of a declared or actual situation of neutrality when hostilities are pending between other nations. Of that general proposition there seems to be no dispute. But it is alleged that there is a strange confusion of ideas in our minds and in our Argument, in not drawing the distinction between what is thus properly ascribable to extra-territoriality or *ad extra* administration, what deals with outward relations and what has to do with persons and property within the kingdom. This prerogative, it is insisted, gives no power over persons and property within the kingdom

of Great Britain, and it is further insisted that the Foreign-Enlistment Act was the whole measure of the authority of the Government, and the whole measure, therefore, of its duty, *within the kingdom*. It is said the Government had no power by prerogative to make that a crime in the kingdom which is not a crime by the law, or of punishing a crime in any other manner than through the courts of justice. This of course is sound, as well as familiar, law. But the interesting question is, whether the *nation* is supplied with adequate legislation, if that is to furnish the only means for the exercise of international duty. If it is not so supplied, that is a fault as between the two nations; if it is so supplied, and the powers are not properly exercised, that is equally a fault as between the two nations. The course of the American Argument is to show that, either on the one or the other of the horns of this dilemma, the actual conduct of the British Government must be impaled.

We are instructed in this special Argument as to what, in the opinion of the eminent Counsel, belongs to prerogative, and what to judicial action under the statute; but we find no limitation of what is in the power of Parliament, or in the power of administration, if adequate parliamentary provision be made for its exercise. But all this course of Argument, ingenious, subtle, and intricate as it is, finally brings the eminent Counsel around to this point, that by the common law of England *within the realm*, there *is* power in the Crown to use all the executive authority of the nation, civil and military, to prevent a *hostile act* towards another nation within that territory. That is but another name for prerogative, there is no statute on that subject, and no writ from any Court can issue to accomplish that object.

If this is undoubtedly part of the common law of England, as the learned Counsel states, the argument here turns upon nothing else but the old controversy between us, whether these acts were in the nature of *hostile acts*, under the condemnation of the law of nations as such, that ought to have been intercepted by the exercise of prerogative, or by the power of the Crown at common law, whichever you choose to call it. The object of all the discussion of the learned Counsel is continually to bring it back to the point that within the kingdom of Great Britain, the Foreign-Enlistment Act was the sole authority for action and prevention, and if these vessels were reasonably proceeded against, under the requirements of administrative duty in enforcing the Foreign-Enlistment Act, as against persons and property for confiscation or for punishment, that was all that was necessary or proper.

Sir ALEXANDER COCKBURN. "Am I to understand you as a lawyer to say that it was competent for the authorities at the port whence such a vessel escaped to order out troops and command them to fire?"

Mr. EVARTS. That will depend upon the question whether that was the only way to compel her to an observance.

Sir ALEXANDER COCKBURN. "I put the question to you in the concrete."

Mr. EVARTS. That would draw me to another subject, viz, a discussion of the facts. But I will say that it depends upon whether the act she is engaged in committing comes within the category of *hostile acts*.

Sir ALEXANDER COCKBURN. "But taking this case, and laying aside the question of due diligence. The vessel is going out of the Mersey. Do you say as a lawyer that she should be fired upon?"

Mr. EVARTS. Under proper circumstances, yes.

Sir ALEXANDER COCKBURN. "But I put the circumstances."

Mr. EVARTS. You must give me the attending circumstances that

show such an act of force is necessary to secure the execution of the public authority. You do not put in the element that that is the only way to bring such a vessel to. If you add that element, then I say yes.

Sir ALEXANDER COCKBURN. "She is going out of the port. They know she is trying to escape from the port. Do you, I again ask—do you, as a lawyer, say that it would be competent for the authorities without a warrant, simply because this is a violation of the law, to fire on that vessel?"

Mr. EVARTS. Certainly, after the usual preliminaries of hailing her, and firing across her bows, to bring her to. Finally, if she insists on proceeding on her way, and thus raises the issue of escape from the Government, or forcible arrest by the Government, you are to fire into her. It becomes a question whether the Government is to surrender to the ship, or the ship to the Government. Of course, the *lawfulness* of this action depends upon the question whether the act committed is, under the law of nations, *a violation of the neutrality of the territory, and a hostile act*, as it is conceded throughout this argument, the evasion of an *armed* ship would be.

In section sixteen of this argument you will find the statement of the learned Counsel on this subject of the executive powers of the British Government in this behalf:

> It is impossible too pointedly to deny the truth of this assumption, or too pointedly to state that, if any military or naval expeditions, or any other acts or operations of war, against the United States, in the true and proper sense of these words, had been attempted within British territory, it would not have been necessary for the British Government, either to suspend the *habeas-corpus* act, or to rely on the Foreign-Enlistment Act, in order to enable it to intercept and prevent by force such expeditions, or such acts or operations of war. The whole civil police, and the whole naval and military forces of the British Crown, would have been lawfully available to the Executive Government, *by the common law of the realm*, for the prevention of such proceedings.

This is the law of England as understood by the eminent Counsel who has presented this argument. Given the facts that make the evasion from the port of Liverpool of the vessel proposed a violation of the law of nations—because it is a hostile act against the United States, and exposes Great Britain to responsibility for the violation of neutrality—then, the situation has arisen, in the failure of civil means, the failure of remonstrance, of arrest and of bringing to, for firing into the vessel. For certainly, if we have authority to stop, we are not to have that authority met and frustrated by the persistence of violent resistance to it.

It certainly makes very little difference to us whether this authority of the executive to use all its forces for the actual prevention of the occurrence of these hostile transactions within the realm is lodged in what he calls the common law of Great Britain, or is found, as we suppose, in the prerogative of the Crown. Nor do I understand this argument, throughout, to quarrel with the proposition that an *armed* ship that should undertake to proceed out of the port of Liverpool would be exposed to the exercise of that power; and, of course, if the proper circumstances arose, even to the extent to which it has been pushed in answer to the questions put to me by one of the members of the Tribunal. For, if the Queen is to use all her power to prevent a hostile act, and if an armed vessel is, in its evasion of a port, committing a hostile act, that power can be exerted to the point of firing into such

vessel, if necessary, as well as of merely exerting the slightest touch, if that proves sufficient to accomplish the object.[1]

Sections seventeen to twenty-five are occupied with a discussion concerning the *preventive* powers and *punitive* powers under the legislation of Great Britain as compared with that of the United States. While there is here a denial that the British Government ever put itself upon a necessary confinement to the *punitive* powers of that Act, or that that Act contains no *preventive* power, or that it contains not so much as the Act of the United States, still, after all, I find no progress made beyond this: that the preventive powers, thus relied upon and thus asserted, as having origin under, and by virtue of, the act, are confined to the prevention that springs out of the *ability to punish*, or out of the *mode* in which the power to punish is exercised.

Preventive and punitive powers of each government.

Nor will the text of the Foreign Enlistment Act furnish any evidence that it provides any power for the *prevention* by law of the evasion of such a vessel, except in the form of prosecution for *confiscation*, which is one of the modes of punishment. And when this Foreign Enlistment Act was passed in 1819, it was thus left unaccompanied by any executive power of interception and prevention, for the reason, as shown in the debates, that this interceptive and preventive power resided in the prerogative of the Crown, and could be exercised by it. This will be seen from the debates which we have appended in Note B to our Argument.

In comparing that law with the preceding act passed in 1818 by the American Government, the debates in Parliament gave as the reason for the lodgment of this preventive power in the Executive of the United States, by the act of Congress, and for its not being necessary to lodge a similar preventive power in the British Crown, that there was no prerogative in America, while there was in Great Britain.

To be sure, when one of the punishments provided by law is a proceeding *in rem* for confiscation of the vessel, if you serve your process at a time and under circumstances to prevent a departure of the vessel on its illegal errand, you do effect a detention. But that is all. The trouble with that detention is, that it is only a detention of process, to

[1] It would seem to be quite in accordance with the ordinary course of Governments in dealing with armed (or merchant) ships, that refuse obedience to a peaceful summons of sovereignty to submit to its authority, to enforce that summons by firing into the contumacious ship.

In "Phillimore," vol. iii, pp. 231–4, will be found the orders of the British Government in the matter of the "Terceira Expedition," and an account of their execution. Captain Walpole "fired two shots, to bring them to, but they continued their course. The vessel, on board of which was Saldanha, although now within point blank range of the Ranger's guns, seemed determined to push in at all hazards. *To prevent him from effecting his object*, Captain Walpole was under the necessity of firing a shot at the vessel, which killed one man and wounded another." (P. 232.)

The eighth article of the Brazilian Circular of June 23, 1863, provides for the necessary exhibition of force, as follows:

"8. Finally, force shall be used (and in the absence or insufficiency of this, a solemn and earnest protest shall be made) against a belligerent who, on being notified and warned, *does not desist from the violation of the neutrality of the Empire.* Forts and vessels of war shall be ordered to fire on a belligerent, who shall," &c. (7 Am. App., p. 113.)

Indeed, there is no alternative, unless the solution of the difficulty laid down by Doggberry is preferred:

"DOGBERRY. You are to bid any man stand in the prince's name.

"WATCH. How if he will not stand?

"DOGBERRY. Why, then, take no note of him, but let him go; and presently call the rest of the watch together, and thank God you are rid of a knave."

[SHAKESPEARE, *Much Ado about Nothing*, Act iii, Sc. 3.

bring to issue and to trial a question of private right, a confiscation of the ship, which is to be governed by all the rules of law and evidence, which are attendant upon the exercise of authority by the Crown, in taking away the property of the subject.

It never was of any practical importance to the United States, whether the British Government confiscated a ship or imprisoned the malefactors, except so far as this might indicate the feelings and sympathy of that nation. All we wished was, that the Government should *prevent* these vessels from going out. It was not a question with us, whether they punished this or that man, or insisted upon this or that confiscation, *provided* the interception of the cruisers was effected. When, therefore, we claimed under the Foreign Enlistment Act or otherwise, that these vessels should be seized and detained, one of the forms of punitive recourse under that act would have operated a detention, *if applied at the proper time and under the proper circumstances. Confiscation* had its place whenever the vessel was in the power of the Government; but it was only by interception of the *enterprise* that we were to be benefited. That interception, by some means or other, we had a right to; and if your law, if your constitution, had so arranged matters that it could not be had, except upon the ordinary process, the ordinary motives, the ordinary evidence, and the ordinary duty by which confiscation of private property was obtained, and that provision was not adequate to our rights, then our argument is that your law needed improvement.

But it is said that nothing in the conduct of Great Britain, of practical importance to the United States, turned upon the question whether the British law, the Foreign Enlistment Act, was applicable only to an *armed* vessel, or was applicable to a vessel that should go out merely prepared to take its armament. How is it that nothing turned upon that question? It is so said because, as the learned Counsel contends, the Government adopted the construction that the statute did embrace the case of a vessel unarmed. But take the case of the Alabama, or the Florida, for an illustration, and see how this pretension is justified by the facts. What occasioned the debates of administrative officers? What raised the difficulties and doubts of custom-house and other officials, except that the vessel was *not* armed, when, as regards both of these vessels, the Executive Government had given orders that they should be watched? Watched! watched, indeed! as they were until they went out. They were put under the eye of a watching supervision, to have it known whether an armament went on board, in order that *then* they might be reported, and, it may be, intercepted. The whole administrative question of the practical application of authority by the British Government, in our aid, for the *interception* of these vessels, turned upon the circumstance of whether the vessel was armed or was not armed. Under the administration of that question, they went out without armaments, not wishing to be stopped, and, by pre-arrangement, took their armaments from tenders that subsequently brought them, which, also, could not be stopped.

Certain observations of Baron Bramwell are quoted by the learned Counsel in this connection, which are useful to us as illustrating the turning point in the question as to armed and unarmed vessels. They are to this effect, and exhibit the British doctrine:

A vessel fitted to receive her armament *and* armed, is a vessel that should be stopped under an international duty. This amounts to an act of proximate hostility which a neutral is bound to arrest. Baron Bramwell held that the emission of a vessel *armed* is, un-

doubtedly, a hostile expedition within the meaning of the law of nations. But a vessel fitted to receive her armament in the neutral port, and sent out of that port by the belligerent only in that condition, he held is not an enterprise in violation of the law of nations, and is not a hostile expedition in the sense of that law. By consequence, Baron Bramwell argued, nothing in such an enterprise of a belligerent from a neutral port calls for the exercise of authority on the part of the neutral, either by law or by executive interference, and, until the armament gets on board, there is nothing to bring the case within the province of *international* proscription and of *international* responsibility. It was then, he argues, only a question for Great Britain whether the provisions of the Foreign Enlistment Act can touch such a vessel, and the only question for the British Government was as towards the United States, have they done their duty to themselves in the enforcement of the municipal law, which involves a question of international responsibility to the United States? We insist, therefore, that so far from nothing practical turning upon this distinction, all the doubts and difficulties turn upon it, especially in connection with the ancillary proposition that these vessels could be provided, by means of their tenders, with armaments, without any accountability for the complete hostile expedition.[1]

It is said that we can draw no argument as to the deficiency of their old Act, from the improved provisions of the new Act of 1870. Why not? When we say that your Act of 1819 was not adequate to the situation, and that, if you had no prerogative to supply its defects, you should have supplied them by Act of Parliament—that you should have furnished by legislation the means for the performance of a duty which required you to prevent the commission of the acts which we complain of—it is certainly competent for us to resort to the fact that, when our war was over, from *thenceforth*, movements were made toward the amendment of your law, and that, when the late war on the continent of Europe opened, your new Act was immediately passed containing all the present provisions of practical executive interception of such illegal enterprises—it is, I say, competent for us to refer to all this as a strong as well as fair argument, to show that, even in the opinion of the British Parliament, the old Act was not adequate to the performance of the *international* duties of Great Britain to the United States.

Sections 27 to 30 of the special argument are occupied with a discussion of that part of our Argument which alleges, as want of due diligence, the entire failure of Great Britain to have an active, effective, and spontaneous investigation, scrutiny, report, and interceptive prevention of enterprises of this kind. Well, the comments upon this are of two kinds: first, concerning the question, under a somewhat prolonged discussion of facts, whether the Government did or did not do this, that, or the other thing;[2] and, then, con-

The failure of Great Britain to originate investigation or proceedings.

[1] Mr. Théodore Ortolan, in a late edition of his "Diplomatie de la mer," tome ii, says: "Nous nous rattacherons, pour résoudre en droit des gens les difficultés que présente cette nouvelle situation, à un principe universellement établi, qui se formule en ce peu de mots: 'Inviolabilité du territoire neutre.' Cette inviolabilité est un droit pour l'état neutre, dont le territoire ne doit pas être atteint par les faits de guerre, mais elle impose, aussi, à ce même état neutre, une étroite obligation, celle de ne pas permettre, celle d'empêcher, activement au besoin, l'emploi de ce territoire par l'une des parties, ou au profit de l'une des parties belligérantes, dans un but hostile à l'autre partie."—*Case of the U. S.*, p. 182.

[2] It does not seem profitable to go into a minute examination of the proofs before the Tribunal to establish the propositions of our Argument specially controverted in sections 29 and 30 of the present argument of the eminent Counsel. Although the letter of Earl Russell, quoted by the learned Counsel, does, incidentally, refer to certain

cerning the more general question, as to whether the Rules of this Treaty call upon this Tribunal to inquire into any such deficiency of diligence which was not applicable to the case of a vessel respecting which the British Government "had reasonable ground to believe" that a violation of the law was meditated.

The "due diligence" required by the Rules is a diligence to prevent a hostile act.

Our answer to this latter question is, that the Rules together, in their true construction, require the application of due diligence (particularly under the special emphasis of the third Rule) "to prevent" the occurrence of any of the infractions of the law of nations proscribed by the Rules.

There are two propositions in these Rules. Certain things are assigned as violations of the law of nations, and as involving a duty on the part of a neutral Government to prevent them; and besides in and toward preventing them, it is its duty to use due diligence. In regard to every class of alleged infractions of these Rules, there comes to be an inquiry, first, whether, in the circumstances and facts which are assigned, the alleged infractions are a violation of any of the *duties* under the law of nations as prescribed by those Rules. If not, they are dismissed from your consideration. But if they are so found, then these Rules, by their own vigor, become applicable to the situation, and then comes the inquiry whether Great Britain did, in fact, use due diligence to prevent the proscribed infractions. It is under the sections now under review that the learned Counsel suggests whether it is supposed that this general requirement of the use of due diligence by Great Britain is intended to cover the cases of vessels like the Shenandoah and the Georgia, (which it is alleged the British Government had no reasonable ground to believe were meditating or preparing an evasion of the laws or a violation of the duties of Great Britain,) or the cases of these tenders that supplied the Georgia and the Shenandoah and the Florida and the Alabama with their armaments and munitions of war—it is under these sections that this discussion arises. The answer on our part to this suggestion is, that the general means of diligence to keep the Government informed of facts and enable it to judge whether there was "reasonable ground to believe" in any given case, and thus enable it *to be prepared* to intercept the illegal enterprise, are required in cases that the Rules proscribe as infractions of neutrality.

I will agree that under the first clause of the first Rule the duty is applied to a vessel concerning which the Government "shall have reasonable ground to believe," &c. Under the second clause of the first Rule, this phrase is omitted, and the question of "reasonable ground to believe" forms only an element in the more general question of "due diligence." Under the second Rule also, the whole subject of the use of the neutral ports and waters as a base of naval operations is open; and, if there has been a defect of diligence in providing the officers of Great Britain with the means of knowledge and the means of action, to prevent such use of its ports and waters as a base of operations, why, *then*, Great Britain is at fault in not having used due diligence to prevent such use of its ports and waters. That is our argument; and it seems to us it is a sound argument. It is very strange if it is not, and if the duty of a government to use due diligence to prevent its ports

instructions having been given to subordinate officials, yet we look in vain, through the proofs of the British Government, for the text or date or circulation of these instructions. As for the rest, we find nothing in the instances cited, in which specific information happened to be given in regard to this or that vessel or enterprise, which contravenes our general propositions of fact, in this behalf, or the influence of want of due diligence on the part of the British Government, which we have drawn from those facts.

and waters from being used as a base of naval operations does not include the use of due diligence to ascertain whether they were being, or were to be, so used.

It was a fault not to use due diligence to prevent the ports and waters of Great Britain from being used as a base of naval operations, or for the augmentation of force, or the recruitment of men. And to admit that it was a fault, in any case, not to act where the Government had cause to believe that there was to be a violation of law, and yet to claim that it was no fault for the Government to be guilty of negligence in not procuring intelligence and information which might give a reasonable ground to believe, seems to me absurd.

This, indeed, would be to stamp the *lesser* negligence, of not applying due diligence in a particular case when there was "reasonable ground to believe," as a *fault*, entailing responsibility upon a neutral Government, and to excuse the same Government for the systematic want of due diligence which, through indifference to duty and voluntary ignorance, did not allow itself to be placed in a position to judge whether the ground of belief was reasonable, or whether there was any ground at all for its action. The lesser fault infers that the same or greater responsibility is imputable to the greater fault.

Comparison between the statutes of the two nations.

The sections of the special Argument of the learned Counsel which are occupied with a comparison between the practical efficiency of the American and of the English Acts, and in which the propositions of our Argument, in this regard, are questioned and commented upon, will be replied to by my learned associate, Mr. Cushing, in an argument which he will present to the Tribunal. It is enough for me to repeat here the observation of our Argument, that the true measure of the vigor of an act is its judicial interpretation and its practical execution. We do not intend to allow ourselves to be involved in discussions as to the *propriety* of this or that construction of the English act which reduced its power. The question with us is, what were the practical interpretation and exercise of the powers of that act, as compared with the practical interpretation and exercise of the powers of the Neutrality Act of the United States?

The propositions of our Argument seem to us untouched by any of the criticisms which the learned Counsel has applied to them. We, rightly or wrongly, have interpreted our act, from its first enactment to the present time, as giving authority to the Executive of the United States to intercept, by direct exercise of power, all these prohibited enterprises at any stage at which he can lay his hands upon them, for the purpose of *their prevention*. The correspondence produced in our proofs, showing the action of the Executive Government on all the occasions in which this statute has been required to be enforced, will indicate that, whether it has been successful or not in the execution of the duty, the Government has recognized the duty, the Executive has undertaken it, and all the subordinates have had their attention called to it, in the sense and to the end of *prevention*. All subordinates have, as well, always been stimulated to the duty of keeping the Executive, from time to time, fully and promptly supplied with information to secure the efficient execution of the law. And it is not improper, perhaps, for me here to observe, that my learned associate, Mr. Cushing, and myself, having been called upon to execute this statute in the office of Attorney-General of the United States, we can bear testimony to its vigor and its efficiency, in the every day action of the Government. It is submitted to and not questioned, and produces its effect. Whether the Government of the United States, possessing that power under and by

authority of the statute, has always been successful or not, or has always used due diligence in its exercise, and whether it is accountable to this or that nation for a faulty execution of its duties of neutrality, are questions which this Tribunal cannot dispose of, and they are only remotely collateral to any discussions properly before the Arbitrators.

Sir ALEXANDER COCKBURN. "If you are arguing now upon that point, Mr. Evarts, explain this to me. By the last English Act of 1870, the Secretary of State has power, under certain circumstances, to order a vessel to be seized, and then it is provided that the owner of such vessel may make claim, &c., which the court shall as soon as possible consider. I want to ask you, what, under your Act of 1818, which gives power to the President to seize, under similar circumstances, would be the course of proceedings in such a case? How would the owner be able to know whether his vessel was one liable to seizure and confiscation? How would he get his vessel back again according to your form of procedure?

Mr. EVARTS. I take it for granted that the detention which the President might authorize, or cause to be made, would not be an indefinite detention. By the terms of the Act, however, that exercise of the executive power is not, necessarily, terminated by a judicial appeal of any kind.

Sir ALEXANDER COCKBURN. "Do you mean to say that the ship shall remain in the hands of the Government?"

Mr. EVARTS. If the party chooses so to leave it without satisfactory explanation. The President interposes in the discharge of a public duty, to prevent the commission of an act in violation of neutrality, which he believes to be illegal. On representation to him by the aggrieved party, he will release the vessel, if he finds reason. If he does not so release, then the vessel remains subject to the continued exercise of Executive control, under the same motives that first induced it.

Sir ALEXANDER COCKBURN. "Would not the President, in the ordinary practice of things, direct that the matter should be submitted to judicial determination?"

Mr. EVARTS. This Executive interception carries no confiscation. It merely detains the vessel and the owner can apply for its release, giving an explanation of the matter. But the Executive may say, "I am not satisfied with your explanation; if you have nothing else to say, I will keep your vessel;" or he may send it to the courts to enforce its confiscation.

Sir ALEXANDER COCKBURN. "Which does he practically do?"

Mr. EVARTS. He practically, when not satisfied to release it, usually sends it to the court, because the situation admits of that disposition of it. Under the Act of the United States, there is the same actual interception by the Executive which your Act of 1870——

Sir. ALEXANDER COCKBURN. "Under our Act the Executive has no discretion; it must send it to the courts."

Mr. EVARTS. Under our Act, we trust the Executive for a proper exercise of the official authority intrusted to him.

In the American Case, some instances of the exercise of this power on a very considerable scale will be found. (Page 126 of the French translation.) The documents explaining these transactions are collected at length in the Appendix to the American Counter-Case.

The burden of proof.

Sections 38 to 41 of the special argument call in question our position as to *onus probandi*. It is said that we improperly undertake to shift, generally, the burden of proof and require Great Britain to discharge itself from liability by affirmative

proof in all cases where we charge that the act done is within the obligation of the Three Rules. This criticism is enforced by reference to a case arising in the public action of the United States under the Treaty of 1794 with Great Britain.

I will spend but few words here. The propositions of our Argument are easily understood upon that point. They come to this: that, whenever the United States, by its proofs, have brought the case in hand to this stage, that the acts which are complained of, the action and the result which have arisen from it, are violations of the requirements of the law of nations as laid down in the Three Rules, and this action has taken place within the jurisdiction of Great Britain, (so that the principal fact of accountability within the nation is established,) *then*, on the ordinary principle that the affirmative is to be taken up by that party which needs its exercise, the proof of "due diligence" is to be supplied by Great Britain. How is a foreigner, outside of the Government, uninformed of its conduct, having no access to its deliberations or the movements of the Government, to supply the proof of the *want* of due diligence? We repose, then, upon the ordinary principles of forensic and judicial reasoning. When the act complained of is at the fault of the *nation*, having been done within its jurisdiction, and is a violation of the law of nations for which there is an accountability provided by these Three Rules, the point of determination whether due diligence has been exercised by the authorities of the country to prevent it, or it has happened in spite of the exercise of due diligence—the burden of the proof of "due diligence" is upon the party charged with its exercise.

Let us look at the case of the Elizabeth, which is quoted in section 41. It is a long quotation and I will read, therefore, only the concluding part. It will be found on page 50 of the French translation of the special argument. The question was as to the burden of proof under the obligation that had been assumed by the United States:

> The promise was conditional. We will restore in all those cases of complaint where it shall be established by sufficient testimony that the facts are true which form the basis of our promise; that is, that the property claimed belongs to British subjects; that it was taken either within the line of jurisdictional protection, or, if on the high seas, then by some vessel illegally armed in our ports; and that the property so taken has been brought within our ports. By whom were these facts to be proved? According to every principle of reason, justice, or equity, it belongs to him who claims the benefit of a promise to prove that he is the person in whose favor, or under the circumstances in which the promise was intended to operate.

A careful perusal of this passage is sufficient to show that the *facts* here insisted upon as necessary to be proved by the claimant are precisely equivalent to the facts which the United States are called upon to prove in this case. The facts, as I have before stated, bring the circumstances of the claim to the point where it appears that the responsibility for the injury rests upon Great Britain *unless* due diligence was used by the Government to prevent the mischievous conduct of the subjects or residents of that kingdom which has produced the injuries complained of. In the absence of this due diligence on the part of that Government, the apparent responsibility rests undisturbed by the exculpation which the presence of due diligence will furnish. The party needing the benefit of this proof, upon every principle of sound reason, must furnish it. This is all we have insisted upon in the matter of the burden of proof.

In conclusion of the first chapter of this special argument, the eminent Counsel, at section 43, takes up the "*Terceira affair*," and insists that if Great Britain, in a particular situation for the exercise of duties of neutrality, took extraordinary measures, it

The Terceira affair.

does not prove that the Government were under obligation to take the same measures in every similar or comparable situation.

We referred to the Terceira affair for the purpose of showing that the Crown by its prerogative *possessed* authority for the interception of enterprises originating within the kingdom for the violation of neutrality. The question, whether the Executive will use it, is at *its* discretion. The *power* we prove, and, in the discussions in both Houses of Parliament, it was not denied, in any quarter, that the power existed to the extent that *we call for its exercise within British jurisdiction.* The question in controversy then was (although a great majority of both Houses voted *against* the resolutions condemning the action of the Government) whether, in the waters of Portugal or upon the seas, the Government could, with strong hand, seize or punish vessels which had violated the neutrality of Great Britain by a hostile though unarmed expedition from its ports. The resolutions in both Houses of Parliament received the support of only a small minority. *Mr. Phillimore*, however, says the learned Counsel, expresses the opinion in his valuable work that the minority were right.

Sir ALEXANDER COCKBURN. "I confess I always thought so myself."

Mr. EVARTS. But the point now and here in discussion is, what were the powers of the Crown *within* the limits of British jurisdiction, and it is not necessary to consider who were right or who were wrong in the divisions in Parliament. What all agreed in was, that the fault charged upon the Government was the invasion of the territorial rights of another nation.

But we cited the Terceira affair for the additional purpose of showing the actual *exercise* of the power in question by the Crown in that case. This was important to us in our argument; it justly gave support to the imputation that the powers of the Government were *not* diligently exercised during the American Rebellion in our behalf. Where there is a will, there is a way; and diligence means the use of all the faculties necessary and suitable to the accomplishment of the proposed end.

Conclusion.

Now, in conclusion, it must be apparent that the great interest, both in regard to the important controversy between the High Contracting Parties, and in regard to the principles of the law of nations to be here established, turns upon your award. That award is to settle two great questions: whether the acts which form the subject of the accusation and the defense, are shown to be acts that are proscribed by the law of nations, as expressed in the Three Rules of the Treaty. You cannot alter the nature of the case between the two nations, as shown by the proofs. The facts being indisputably established in the proofs, you are then to pass upon the question whether the outfit of these tenders to carry forward the armament of the hostile expedition to be joined to it outside of Great Britain is according to the law of nations or not.

When you pass upon the question whether this is a violation of the second Rule, you pass upon the question, under the law of nations, whether an obligation of a neutral not to allow a hostile expedition to go forth from its ports can be evaded by having it sent forth in parcels, and having the combination made outside its waters. You cannot so decide in this case, and between these parties, without establishing by your award, as a general proposition, that the law of nations proscribing such hostile expeditions may be wholly evaded, wholly set at naught by this equivocation and fraud practiced upon it; that this can be done, not by surprise—for anything can be done by surprise—but that it can

be done *openly and of right.* These methods of combination outside of the neutral territory may be resorted to, for the violation of the obligations of neutrality, and yet the neutral nation, knowingly suffering and permitting it, is free from responsibility! This certainly is a great question.

If, as we must anticipate, you decide that these things are proscribed by the law of nations, the next question is, was "due diligence" used by Great Britain to prevent them?

The measure of diligence actually used by Great Britain, the ill consequences to the United States from a failure on the part of Great Britain to use a greater and better measure of diligence, are evident to all the world. Your judgment, then, upon the second question, is to pronounce whether that measure of diligence which was used and is known to have been used, and which produced no other result than the maintenance, for four years, of a maritime war, upon no other base than that furnished from the ports and waters of a neutral territory, *is* the measure of "due diligence," to prevent such use of neutral territory, which is required by the Three Rules of the Treaty of Washington for the exculpation of Great Britain.

[Translation.[1]]

V.—ARGUMENT OF MR. CUSHING, IN REPLY TO THE SPECIAL ARGUMENT OF SIR ROUNDELL PALMER, AUGUST 6. (SEE PROTOCOL XVIII.)

Mr. PRESIDENT AND GENTLEMEN OF THE TRIBUNAL: We are approaching, as I hope at least, the end of these long debates.

The two Governments had presented their Cases and Counter Cases, supported by voluminous documents. They had also presented their respective Arguments, the whole in conformity with the stipulations of the Treaty of Washington, (Articles IV and V.)

Thus the regular arguments prescribed by the Treaty have been closed.

Now, at the request of one of the honorable Arbitrators, the Tribunal has requested from England, as it had the right to do, explanations on certain definite points, namely:

1. The question of due diligence, generally considered.
2. The special question as to the effect of the commissions held by Confederate ships of war entering British ports.
3. The special question as to supplies of coal in British ports to Confederate ships.

The Counsel of Great Britain has taken advantage of this opportunity to discuss the points laid down, and in reference to them to comment on the Argument of the United States.

I do not complain of this, but I state the fact.

We, the Counsel of the United States, accept the situation such as it is made for us; for we had no desire further to occupy the attention of the Tribunal.

V.—PLAIDOYER DE MR. CUSHING, CONSEIL DES ÉTATS-UNIS, DEVANT LE TRIBUNAL ARBITRAL DE GENÈVE, EN RÉPONSE À L'ARGUMENT DU CONSEIL DE SA MAJESTÉ BRITANNIQUE.

MONSIEUR LE PRÉSIDENT ET MESSIEURS DU TRIBUNAL: Nous approchons, je l'espère du moins, de la fin de ces longs débats.

Les deux gouvernements avaient présenté leurs mémoires et leurs contre-mémoires, appuyés sur des documents volumineux. Ils avaient aussi présenté leurs plaidoyers respectifs, le tout conformément aux stipulations du traité de Washington, (Art. IV et V.)

Ainsi ont été clos les débats réguliers prescrits par le traité.

Maintenant, sur la demande d'un des honorables arbitres, le tribunal a requis de l'Angleterre, comme il en avait le droit, des explications sur certains points déterminés, à savoir:

1. La question des dues diligences, traitée d'une manière générale.
2. La question spéciale de savoir quel a été l'effet des commissions possédées par les vaisseaux de guerre confédérés qui sont entrés dans les ports britanniques.
3. La question spéciale des approvisionnements de charbon accordés aux vaisseaux confédérés dans les ports britanniques.

Le conseil de la Grande-Bretagne a usé de cette occasion pour discuter les points posés, et, à propos de cela, pour commenter le plaidoyer des États-Unis.

Je ne me plains pas de ceci, mais je constate le fait.

Nous, conseils des États-Unis, acceptons la situation telle qu'elle nous est faite; car nous n'avions nul désir d'occuper davantage l'attention du tribunal.

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[1] This argument was written and presented in the French text as shown in the note.

My two colleagues have discussed fully the second and third points. Scarcely have they left me a few words to say on the subject of the first point.

In fact, the task which has devolved on me is merely that of summing up the question, and adding some special observations.

I venture to address the Tribunal in French, in order to economize its precious time, and to reach the close of the discussion as soon as possible. For this object I willingly sacrifice all oratorical pretensions; I endeavor to make myself understood; that is all I aspire to.

THE QUESTION OF DUE DILIGENCE.

Due diligence.

We have now to consider the question of due diligence generally treated.

What does this expression mean? Does the Tribunal require the theoretical lecture of a professor on due diligence? I do not think so. Such a discussion would be perfectly idle, for the following reasons:

1. This theoretical question has already been discussed to satiety. Great Britain has discussed it three times in her Case, Counter Case, and Argument, and she has allowed herself twelve whole months to reflect on it, and accumulate arguments and quotations for the instruction of the Tribunal. We, in the name of the United States, have not expended so many words, but we have said all we wished and desired to bring before the honorable Arbitrators.

A theoretical discussion not wanted.

2. The two Parties were agreed that the theoretical question no longer deserved their attention.

Her Majesty's Government, [says the British Counter Case,] (page 22,) has not attempted a task which has baffled, as it believes, the ingenuity of jurists of all times and countries,—that of defining with any approach to precision, apart from the circumstances of any particular case, what shall be deemed due diligence or reasonable care.

And the Counter Case quotes and adopts the following passage, (page 22, note:)

Mes deux collègues viennent de discuter amplement le second et le troisième points. C'est à peine s'ils m'ont laissé quelque chose à dire à l'égard du premier point.

En effet, ce n'est que la charge de résumer la question et d'ajouter quelques observations spéciales qui m'est dévolue.

J'ose m'adresser au tribunal en français, afin d'économiser son temps précieux et d'arriver au plus tôt à la clôture des débats. Dans ce but je sacrifie volontiers toute prétention oratoire; j'essaie de me faire comprende; c'est tout ce que j'ambitionne.

LA QUESTION DES DUES DILIGENCES.

Maintenant il s'agit de la question des dues diligences traitée d'une manière générale.

Que veut dire cette phrase? Est-ce que le tribunal demande une leçon théorique de professeur sur les dues diligences? Je ne le crois pas. Une telle discussion serait parfaitement oiseuse pour les raisons suivantes:

1. On a déjà discuté a satiété cette question théorique. La Grande-Bretagne l'a discutée trois fois, dans ses mémoires et son plaidoyer, et elle s'est donnée douze mois entiers pour y réfléchir et accumuler des arguments et des citations pour l'instruction du tribunal. Nous, au nom des États-Unis, nous n'avons pas dépensé tant de paroles, mais nous avons dit tout ce qu'il était dans notre désir et notre volonté de faire savoir aux honorables arbitres.

2. Les deux parties étaient d'accord que la question théorique ne méritait plus leur attention.

"Le gouvernement de sa Majesté," dit le contre-mémoire britannique, p. 24, "ne s'est pas imposé une tâche qui a déjoué, à ce qu'il croit, l'habileté des jurisconsultes de tous les temps et de tous les pays; il n'a pas cherché à définer avec une précision approximative, en dehors des circonstances spéciales à un cas particulier, la mesure de ce qu'on devra reconnaître comme la due diligence ou le soin raisonnable."

Et le contre-mémoire adopte en citant ce qui suit, (page 24, note:)

For the rest, [says a distinguished French jurist, treating of this subject in connection with private law,] for the rest, whether the obligation in question is for a thing to be given, or for one to be done, the imputation of default is, in practice, hardly a question of law. The question of fact is always the dominant point, even if it is not the sole one. (Larombière, "Théorie et pratique des obligations," vol. i, p. 417.)

The Counsel of the United States, accepting the doctrine laid down by England, have replied as follows:

We concur in the final considerations of the British Counter Case on this subject of due diligence, in leaving "the Arbitrators to judge of the facts presented to them by the light of reason and justice, aided by the knowledge of the general powers and duties of administration which they possess, as persons long conversant with public affairs." British Counter Case, p. 125. (Argument of the United States, p. 158.)

We remain of this opinion; we refuse to retrace our steps and to discuss afresh questions completely exhausted long ago, and which have been even admitted to be inopportune by both parties.

3. I recognize no diligence but the diligence prescribed by the Treaty. The Counsel of Great Britain appears to endeavor to establish rules of due diligence outside of the Treaty. It is too late to enter on this path. After the progress which the Tribunal has already made in its labors, it is no longer worth while to re-embark on the open sea, the vague[1] region of international law outside of the Treaty. We take our stand on the explicit words of the Treaty, which subordinates general international law to the compact of the three Rules, which is retrospective, and which expressly applies due diligence to the special cases and objects contemplated by those Rules.

For this last reason I refuse to follow the Counsel of Great Britain in his discussion of the question of the difference, if any exists, according to international law, between the duty of neutrals with regard to armed vessels and their duty with regard to vessels equipped for war but not yet armed.

"Du reste," a dit un jurisconsulte éminent de France, qui examine la question au point de vue de droit privé, "Du reste, soit qu'il s'agisse d'une obligation de donner ou de faire, la prestation des fautes est, dans la pratique, à peine une question de droit. Le point de faite y est toujours dominant, quand il n'y est pas tout." (Larombière, "Théorie et pratique des obligations," tome i, p. 417.)

Les conseils des États-Unis ont répondu, en acceptant la doctrine de la Grande-Bretagne, comme suit:

"Nous sommes d'accord avec les considérations qui terminent le contre-mémoire britannique sur cette question de la diligence suffisante, pour laisser les arbitres juger les faits qui leur sont soumis, d'après les lumières de la raison et de la justice, aidées par la connaissance des pouvoirs et des devoirs généraux de l'administration que leur a don née leur longue pratique des affairs publiques. Contre-mémoire britannique, p. 151, texte français." (Plaidoyer des États-Unis, p. 328.)

Nous restons de cet avis; nous refusons de revenir sur nos pas et de discuter de nouveau des questions depuis longtemps déjà complétement épuisées, et même reconnues inopportunes par les deux parties.

3. Je ne reconnais pas d'autres diligences que les diligences du traité. Le conseil de la Grande-Bretagne paraît s'efforcer d'établir des règles des diligences dues en dehors du traité. Il est trop tard pour entrer dans cette voie. Après les pas en avant que le tribunal a déjà faits dans ses travaux, il ne vaut plus la peine de nous rembarquer sur la vague, ou le *vague* du droit des gens en dehors du traité. Nous nous appuyons sur les paroles explicites du traité, qui subordonne le droit des gens général au pacte des trois règles, qui est rétroactif et qui applique expressément les diligences dues aux cas et aux objets spéciaux de ces règles.

Pour cette dernière considération je refuse de suivre le conseil de la Grande-Bretagne dans sa discussion sur la question de la différence qui existe d'après le droit des gens, s'il en existe une, entre le devoir des neutres à l'égard des navires armés en guerre et leur devoir à l'égard des navires équipés pour la guerre et pas encore armés.

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[1] There is a play on the words "la vague" and "le vague" in the original which cannot be translated.

The Treaty cuts short this question absolutely. It is sufficient to call attention to the first Rule:

A neutral Government is bound—

First. To use due diligence to prevent the fitting out, arming, or equipping, within its jurisdiction, of any vessel which it has reasonable ground to believe is intended to cruise or to carry on war against a Power with which it is at peace; and also to use like diligence to prevent the departure from its jurisdiction of any vessel intended to cruise or carry on war as above, such vessel having been specially adapted, in whole or in part, within such jurisdiction, to warlike use.

Note the three first conditions clearly laid down by the Rule,—"the fitting out," (which has been omitted, without sufficient reason, in the English translation,) "arming," "or equipping."

Note also the two following conditions, which are equally clear, "any vessel intended to cruise or carry on war," or "any vessel having been specially adapted in whole or *in part* to warlike use."

Looking to these conditions, so precise and definite, to which the diligence of the Treaty is to be applied, and considering the manifest uselessness of any discussion outside of these three Rules, it may well be suspected that the object of the Counsel of Great Britain, in thus digressing from the Treaty, was to make a fitting preface to the observations which follow, designed to weaken, if possible, the force of the words of Sir Robert Phillimore and Sir Roundell Palmer quoted in the Argument of the United States.

SIR ROBERT PHILLIMORE.

Views of Sir Robert Phillimore.

We have quoted from Sir Robert Phillimore's Commentaries on International Law the following passages:

There remains one question of the gravest importance, namely, the *responsibility of a State for the acts of her citizens*, involving the duty of a neutral to prevent armaments

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Le traité tranche absolument cette question. Il suffit d'appeler l'attention sur la première règle:

"Un gouvernement neutre est obligé—

"1. À faire toutes les diligences nécessaires pour s'opposer dans les limites de sa juridiction à ce qu'un vaisseau soit mis en mesure de prendre la mer, à ce qu'il soit armé ou équipé, quand ce gouvernement a des motifs suffisants pour penser que ce vaisseau est destiné à croiser ou à faire des actes de guerre contre une puissance avec laquelle il est lui-même en paix. Ce gouvernement doit fair également toutes les diligences nécessaires pour s'opposer à ce qu'un vaisseau destiné à croiser ou à faire des actes de guerre, comme il est dit ci-dessus, quitte les limites de la juridiction territoriale dans le cas où il y aurait été spécialement adapté, soit en totalité, soit en partie, à des usages belligérants."

Notons les trois premières conditions très claires de la règle: "à ce qu'un vaisseau soit mis en mesure de prendre la mer," (ce qui est omis, sans raison suffisante, dans la traduction anglaise;) "à ce qu'il soit armé," "ou équipé."

Notons, aussi, les deux conditions suivantes, également claires, "un vaisseau destiné à croiser ou à faire des actes de guerre," ou "un vaisseau spécialement adapté, soit en totalité *soit en partie*, à des usages belligérants."

En voyant ces conditions, si définies et si nettes, auxquelles les diligences du traité doivent être appliquée, et en considérant l'inutilité manifeste de toute discussion en dehors des trois règles, on pourrait bien soupçonner que le conseil de la Grande-Bretagne, en s'écartant ainsi du traité, avait pour objet de faire une préface convenable aux observations qui suivent, destinées à atténuer, s'il eût été possible, la force des paroles de Sir Robert Phillimore et de Sir Roundell Palmer, citées dans le plaidoyer des États-Unis.

SIR ROBERT PHILLIMORE.

Nous avons cité des Commentaires du droit international de Sir Robert Phillimore les passages suivants:

"Il reste une question de la plus grande importance, à savoir, la *responsabilité d'un état* par rapport *aux actes* de ses citoyens, laquelle implique le devoir d'un neutre d'em-

and ships of war issuing from her shores for the service of a belligerent, though such armaments were furnished and ships were equipped, built, and sent without the knowledge and contrary to the orders of her Government.

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It is a maxim of general law, that so far as foreign States are concerned, the will of the subject must be considered as bound up in that of his Sovereign.

It is also a maxim that each State has a right to expect from another the observance of international observations, without regard to what may be the municipal means which it possesses for enforcing this observance.

The act of an individual citizen, or of a small number of citizens, is not to be imputed without clear proof to the Government of which they are subjects.

A Government may by *knowledge* and *sufferance*, as well as by direct *permission*, become responsible for the acts of subjects whom it does not prevent from the commission of an injury to a foreign State.

A Government is presumed to be able to restrain the subject within its territory from contravening the obligations of neutrality to which the State is bound.

* * * * * * *

A State is *prima facie* responsible for whatever is done within its jurisdiction; for it must be *presumed* to be capable of preventing or punishing offenses committed within its boundaries. A body politic is therefore responsible for the acts of individuals, which are acts of actual or meditated hostility toward a nation with which the Government of these subjects professes to maintain relations of friendship or neutrality.

The Counsel of Great Britain now affirms that all these expressions of Sir Robert Phillimore must be considered as limited to the case of an *armed* vessel, or of a *military*, and not a *naval expedition*.

I deny the possibility of such a distinction. It has no foundation in the words of the author. I appeal in that respect to the appreciation of the honorable Arbitrators.

But, supposing that this distinction were well founded, it would not justify the conclusions of the Counsel of Great Britain, because the principles laid down by Sir Robert Phillimore are of general application, and comprise all possible cases. Take any duty whatever of due diligence to be fulfilled on the part of a neutral Government toward a

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pêcher que des armements et des vaisseaux de guerre sortent de ses ports pour le service d'un belligérant, quoique ces armements aient été fournis, et les navires construits, équipés et expédiés à l'insu et contre les ordres de son gouvernement. * * * C'est une maxime de droit général qu'en ce qui concerne les états étrangers, la volonté du sujet doit être considérée comme liée à celle de son souverain.

"C'est aussi une maxime que chaque état a le droit d'attendre d'un autre l'accomplissement des obligations internationales, sans égard à ce que peuvent être les moyens municipaux qu'il possède pour les faire observer.

"L'acte d'un simple citoyen ou d'un petit nombre de citoyens ne doit pas être imputé sans preuves évidentes au gouvernement dont ils sont sujets.

"Un gouvernement peut, par *connaissance* et *tolérance* aussi bien que par *permission* directe, devenir responsable des actes de ses sujets, qu'il n'empêche pas de commettre des dommages à un état étranger.

"Un gouvernement est présumé pouvoir empêcher ses sujets, dans les limites de son territoire, de contrevenir aux obligations de la neutralité qui lient l'état. * * * * Un état est *prima facie* responsable de tout ce qui se fait dans l'étendue de sa juridiction, car il doit être *présumé* capable d'empêcher ou de punir les offenses commises en-deçà de ses frontières. Un corps politique est, par conséquent, responsable des actes d'individus qui sont des actes d'hostilité effective ou préméditée contre une nation avec laquelle le gouvernement de ces individus déclare entretenir des relations d'amitié ou de neutralité."

Maintenant le conseil de la Grande-Bretagne prétend que toutes ces expressions de Sir Robert Phillimore sont censées devoir être bornées au cas d'un vaisseau *armé* en guerre ou d'une *expédition militaire* et *non* navale.

Je nie la possibilité de cette distinction. Elle n'a aucun fondement dans les paroles de l'auteur. Je m'en rapporte à l'appréciation des honorables arbitres.

Mais, en supposant que cette distinction soit bien fondée, elle ne justifierait pas les conclusions du conseil de la Grande-Bretagne, parceque les principes énoncés par Sir Robert Phillimore sont d'une application générale et comprennent tous les cas possibles. Prenons un devoir des dues diligences quelconques à remplir de la part d'un gouvernement neutre envers un gouvernement belligérant, et alors, dans ce cas, Sir

belligerent Government, and then, in that case, Sir Robert Phillimore tells us in what manner and according to what principles the neutral Government should act. It must fulfill its international obligations "without regard to what may be the municipal means which it possesses for enforcing them." Moreover, "a Government may by *knowledge* and *sufferance*, as well as by *direct permission*, become responsible for the acts of subjects whom it does not prevent from the commission of an injury to a foreign State."

Such is the thesis, on the subject of due diligence *generally considered*, which the Counsel of the United States have constantly maintained, and which Great Britain has constantly contested in her Case, Counter Case, and Argument."

Now, the duty which is incumbent on Great Britain is defined by the three Rules, and we have the right to consider the general maxims of Sir Robert Phillimore in the light of these Rules. This is what we have done in our Argument.

THE LAIRD RAMS.

But we hasten to see what the Counsel of Great Britain has to say concerning the quotation we have made from a speech of Sir Roundell Palmer on the subject of the "Laird Rams."

I beg to call the attention of the Tribunal to the words of the speech itself:

Views of Sir Roundell Palmer in the case of the rams.

I do not hesitate, [says Sir Roundell Palmer,] to say boldly, and in the face of the country, that the Government, *on their own responsibility*, detained them. They were prosecuting inquiries which, though imperfect, left on the mind of the Government strong reasons for believing that the result might prove to be that these ships were intended for an illegal purpose, and that if they left the country the law would be violated, and a great injury done to a friendly Power. *The Government did not seize the ships; they did not by any act take possession of or interfere with them;* but, on their own responsibility, they gave notice to the parties interested that the law should not be evaded until the pending inquiry should be brought to a conclusion, when the Government would know whether the inquiry would result in affording conclusive grounds for seizing the ships or not.

Robert Phillimore nous apprend de quelle manière, et conformément à quels principes, le gouvernement neutre doit agir. Il doit remplir ses obligations internationales, "sans avoir égard à ce que peuvent être les moyens municipaux qu'il possède pour les faire observer." De plus, "un gouvernement peut, par *connaissance* et *tolérance* aussi bien que par *permission directe*, devenir responsable de ses sujets, qu'il n'empêche pas de commettre des dommages à un état étranger."

Telle est la thèse, au sujet des dues diligences *traitées d'une manière générale*, que les conseils des États-Unis ont constamment soutenue, et que la Grande-Bretagne a constamment combattue dans ses mémoires et son plaidoyer.

Maintenant, le devoir qui incombe à la Grande-Bretagne est défini par les trois règles; et nous avons le droit de considérer les maximes générales de Sir Robert Phillimore à la lumière de ces règles. C'est là ce que nous avons fait dans notre plaidoyer.

LES LAIRD RAMS.

Mais nous avons hâte de voir ce que le conseil de la Grande-Bretagne veut dire concernant la citation que nous avons faite d'un discours de Sir Roundell Palmer à propos des "Laird rams."

J'appelle l'attention du tribunal sur les mots mêmes de ce discours:

"Je n'hésite pas," dit Sir Roundell Palmer, "à dire hardiment et à la face du pays que le gouvernement, *sous sa propre responsabilité*, les a détenus. On poursuivait une enquête qui, quoiqu'imparfaite, laissait dans l'esprit du gouvernement de fortes raisons de croire qu'on parviendrait à constater que ces navires étaient destinés à un but illégal, et que, s'ils quittaient le pays, la loi serait violée et un grand préjudice causé à une puissance amie. *Le gouvernement n'a pas saisi les navires; il n'a rien fait pour s'en emparer ou pour les arrêter*, mais, sous sa responsabilité, il a prévenu les parties intéressées que la loi ne serait pas éludée jusqu'à ce que l'enquête commencée fût terminée, et jusqu'à ce que le gouvernement sût si l'enquête réussirait à établir des raisons suffisantes pour autoriser, oui ou non, la saisie des navires.

If any other great crime or mischief were in progress, could it be doubted that the Government would be justified in taking steps to prevent the evasion from justice of the person whose conduct was under investigation until the completion of the inquiry? In a criminal case, we know that it is an ordinary course to go before a magistrate, and some information is taken, of a most imperfect character, to justify the accused's committal to prison for trial, the prisoner being remanded from time to time. That course cannot be adopted in cases of seizures of vessels of this description. The law gives no means for that, and therefore it is that the Government, on their own responsibility, must act, and have acted, in determining that what had taken place with regard to the Alabama should not take place with respect to these ships; that they should not slip out of the Mersey, and join the navy of the belligerent Power, contrary to our law, if that were the intention, until the inquiry in progress should be so far brought to a conclusion as to enable the Government to judge whether the ships were really intended for innocent purposes or not.

The Government were determined that the inquiries which they were making should be brought to a legitimate conclusion, that it might be seen whether those inquiries resulted in evidence, or not, of the vessels being intended for the Confederates, and that, in the mean time, they would not permit the ends of justice to be baffled by the sudden removal of the ships from the river.

It is impossible that the case of the Government can now be brought before the House; but the Government have acted under a serious sense of their duty to themselves, to Her Majesty, *to our allies in the United States, and to every other nation with whom Her Majesty is in friendship and alliance, and with whom questions of this kind may be liable hereafter to arise.*

Under a sense of that duty, they have felt that this is not a question to be treated lightly, or as one of no great importance. If an invasion of the statute law of the land was really about to take place, it was the duty of the Government to use all possible means to ascertain the truth, and to prevent the escape of vessels of this kind, to be used against a friendly Power.

The sentiments expressed in this speech do honor to the man and the statesman. Here, at last, we recognize the language of an enlightened conscience, and of a lawyer equal to his high duties, instead of the ex-

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"Si tout autre grand crime ou méfait était en train de se commettre, pourrait-on douter que le gouvernement ne fût justifié à prendre des mesures pour empêcher d'échapper à la justice toute personne dont la conduite serait sous le coup d'une enquête jusqu'à ce que cette enquête fût terminée? Dans une cause criminelle, nous savons que la marche ordinaire consiste à aller devant un magistrat; on procède à une information d'un caractère fort imparfait pour justifier l'envoi de l'accusé en prison en attendant son jugement. Dans l'intervalle, le prisonnier est amené à différentes reprises devant le juge instructeur. Mais cette marche ne peut pas être suivie dans les cas de saisie de vaisseaux de cette espèce. La loi ne nous en donne pas les moyens. Et c'est ainsi, par conséquent, que le gouvernement, sous sa propre responsabilité, a dû agir et a agi en décidant que ce qui avait eu lieu relativement à l'Alabama ne se renouvellerait pas par rapport à ces navires, et qu'ils ne sortiraient pas de la Mersey pour aller rejoindre la marine des puissances belligérantes, contrairement à nos lois, s'ils en avaient l'intention, tant que l'enquête pendante n'aurait pas abouti à une conclusion propre à mettre le gouvernement en mesure de juger si ces bâtiments étaient réellement destinés à un but inoffensif.

"Le gouvernement est décidé à pousser jusqu'à une conclusion légitime l'enquête qu'il fait faire, afin que l'on puisse voir si ces investigations aboutissent à prouver, oui ou non, si ces vaisseaux sont destinés aux confédérés; en attendant, il n'a pas voulu permettre qu'on déjouât les fins de la justice en éloignant subitement les navires des eaux du fleuve.

"Il est impossible de porter la cause du gouvernement devant la Chambre; mais le gouvernement a agi sous l'empire d'un sentiment sérieux de ses devoirs envers lui-même, envers sa Majesté, *envers les États-Unis, nos alliés, envers toute autre nation avec qui sa Majesté est en relations d'amitié et d'alliance, et avec qui des questions de ce genre peuvent par la suite s'élever.*

"Le sentiment de son devoir lui a fait voir que ce n'est là ni une question à traiter légèrement ni une question sans importance. Si l'on avait réellement l'intention d'éluder la loi du royaume, c'était le devoir du gouvernement de se servir de tous les moyens possibles pour constater la vérité et pour empêcher l'évasion de vaisseaux destinés à attaquer une puissance amie."

Les sentiments exprimés dans ce discours font honneur à l'homme, et à l'homme d'état. Ici, enfin, on reconnaît le langage d'une conscience éclairée, et d'un jurisconsulte à la hauteur de ses grands devoirs, au lieu des excuses et des faiblesses qui rem-

cuses and weaknesses with which Lord Russell's correspondence is filled. Every word of this memorable speech is worthy of consideration.

Here, it was the Government which acted on its own responsibility, and which detained the suspected vessels. It was the Government which gave notice to the parties interested that the law should not be evaded, and that the vessels should not leave the Mersey until the pending inquiry should result in proving whether or not these vessels were intended for the confederates. It was the Government which must act in determining that what had taken place with regard to the Alabama (and I add in parenthesis, with regard to the Florida) should not be repeated with respect to these ships. And the Government acted under a serious sense of its duty to itself, to Her Majesty, to the United States, and to every other nation with which Her Majesty has the same relations of amity and alliance as with the United States.

It must be remembered that, in conformity with the advice of Sir Roundell Palmer, the Government had already instituted regular judicial proceedings against the Alexandra and the Pampero.

And it was the Government which acted, prompted by the sense of its duty toward the United States. What a contrast to that which the Government did not do in regard to the Alabama and Florida!

The Government had thrown on Mr. Adams and on Mr. Dudley all the cares with regard to the Alabama and Florida; refusing to act on its own responsibility, it had disdainfully invited the United States to act on their responsibility. It remained with its arms folded, whilst rogues devoid of honesty or shame were unworthily deceiving it on the subject of the ownership and destination of these vessels. There was no provisional investigation, no initiative, on the part of the Government, but an absolute refusal to act otherwise than by legal proceedings, and those to be originated by the United States.

Now, what did the Government do, acting of its own accord and on its own responsibility, in the case of the "rams?" Did it institute judicial proceedings? Did it seize the vessels? Did it arrest them? Was

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plissent la correspondance de Lord Russell. Chaque mot de ce mémorable discours est digne de considération.

Ici, c'est le gouvernement qui a agi sous sa propre responsabilité, et qui a détenu les vaisseaux suspects. C'est le gouvernement qui a prévenu les parties intéressées que la loi ne serait pas éludée et que les navires ne sortiraient de la Mersey qu'après que l'enquête commencée aurait abouti à prouver si, oui ou non, ces vaisseaux étaient destinés aux confédérés. C'est le gouvernement qui a dû agir en décidant que ce qui avait eu lieu relativement à l'Alabama (et j'ajoute, par parenthèse, relativement à la Florida) ne se renouvellerait pas par rapport à ces navires. Et le gouvernement a agi sous l'empire d'un sentiment sérieux de ses devoirs envers lui-même, envers sa Majesté, envers les États-Unis et envers toute autre nation avec laquelle sa Majesté a des relations d'amitié et d'alliance comme avec les États-Unis.

Souvenons-nous que, conformément aux conseils de Sir Roundell Palmer, le gouvernement avait déjà intenté des poursuites judiciares en règle contre l'Alexandra et le Pampero.

Et c'est le gouvernement qui agissait, poussé par le sentiment de ses devoirs envers les États-Unis. Quel contraste avec ce que le gouvernement ne faisait pas relativement à l'Alabama et à la Florida!

Le gouvernement avait rejeté snr Mr. Adams et sur Mr. Dudley tous soins relatifs à l'Alabama et à la Florida; refusant d'agir sous sa responsabilité, il avait dédaigneusement invité les États-Unis à agir sous leur responsabilité. Il est resté, les bras croisés, tandis que des escrocs, sans foi et sans honte, le trompaient indignement au sujet de la propriété et de la destination de ces navires. Nulle enquête provisoire, nulle initiative de la part du gouvernement; refus absolu d'agir autrement que par une poursuite judiciaire, et celle-ci due à l'iuitiative des États-Unis.

Or, qu'a fait le gouvernement, agissant de lui-même et sous sa propre responsabilité, dans le cas des "rams?" A-t-il provoqué une poursuite judiciaire? A-t-il saisi les navires? Les a-t-il arrêtés? A-t-on agi sur des témoignages suffisants pour justifier

action taken on evidence sufficient to justify the seizure, and such as had been required from Mr. Adams and Mr. Dudley with regard to the Florida and the Alabama? No, none of these precautions were taken. But the Government ordered an inquiry similar to that which Mr. Adams had begged it to make in the case of the Florida, and detained the "rams" pending the result of the inquiry, "in order to use all possible means to ascertain the truth, and to prevent the escape of vessels intended to be used against a friendly Power."

Definition of due diligence.

This is the due diligence of the Treaty: "To use all possible means to ascertain the truth and prevent the escape of the vessels."

In order, then, to prove in the most convincing manner that the British Government did not employ due diligence in the case of the Florida and in that of the Alabama, it is sufficient to notice what the Government obstinately refused or certainly neglected to do with respect to those vessels, and what it did actively and on its own initiative with regard to the "rams." The comparison necessarily leads to a conclusion adverse to Great Britain. And Sir Hugh Cairns was perfectly right in saying on that occasion—"Either the Government must contend that what they did in the affair of the 'rams' was unconstitutional, or they ought to have done the same with regard to the Alabama," (and I add with regard to the Florida,) "and they are liable."

It remains to be seen exactly what the Government did with regard to the "rams." Sir Roundell Palmer categorically affirms that these vessels had not been seized, but that they had been detained. He repeats this declaration.

In another speech, it is true, he says, speaking of the Alexandra, that the Government thought it its duty to seize the ship or vessel, according to the form of proceeding under the Customs Acts, (Argument, p. 15.)

But such was not the course followed with regard to the rams, for they were not seized at all, they were simply detained. But how detained? The context clearly implies that they were detained by means of a notification on the part of the Government to the builders and to

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la saisie, et pareils à ceux qu'on avait réclamés de Mr. Adams et de Mr. Dudley à l'égard de la Florida et de l'Alabama? Non, aucune de ces précautions n'a été prise. Mais le gouvernement a ordonné une enquête semblable à celle que Mr. Adams l'avait prié de faire pour la Florida et à détenu les "rams," en attendant le résultat de l'enquête, "afin de se servir de tous les moyens possibles pour constater la vérité et pour empêcher l'évasion de vaisseaux destinés à attaquer une puissance amie."

Voici les dues diligences des règles du traité: "Se servir de tous les moyens possibles pour constater la vérité et pour empêcher l'évasion des vaisseaux."

Donc, pour établir jusqu'à l'évidence la plus absolue que le gouvernement anglais n'avait pas employé les dues diligences, dans le cas de la Florida et dans celui de l'Alabama, il suffit de noter ce que le gouvernement a obstinément refusé, ou certainement négligé, de faire relativement à ces vaisseaux, et ce qu'il a fait activement et de sa propre initiative relativement aux "rams." La comparaison amène forcément une conclusion qui est à la charge de la Grande-Bretagne. Et Sir Hugh Cairns avait pleinement raison de dire à cette occasion: "Ou le gouvernement doit soutenir que ce qu'il a fait dans l'affaire des "rams" n'était pas constitutionnel, ou il aurait dû agir de même à l'égard de l'Alabama, [et j'ajoute de la Florida,] et il est responsable."

Reste à savoir exactement ce que le gouvernement a fait à l'égard des "rams." Sir Roundell Palmer affirme catégoriquement que ces navires n'avaient pas été saisis, mais qu'ils avaient été détenus. Il réitère cette déclaration.

Dans un autre discours, il est vrai, en parlant de l'Alexandra, il dit que le gouvernement croyait de son devoir de saisir ce navire ou bâtiment, selon la procédure imposée par les lois de la douane. (Argument, page 15.)

Mais telle n'etait pas la procédure suivie à l'égard des "rams," car ils n'étaient pas saisis du tout; ils étaient simplement détenus. Mais détenus, comment? Le contexte implique clairement qu'ils étaient détenus au moyen d'une notification, de la part du

the pretended owners, no doubt accompanied by corresponding orders addressed to the officers of the Customs.

The Counsel of Great Britain loudly and positively affirms that the means adopted on the responsibility of the Government, that is to say, by the spontaneous action of the Ministers intrusted with the executive power of the Crown, were perfectly legal and constitutional. We, the Counsel of the United States, are happy to be, on this point, of the same opinion as the Counsel of Great Britain.

But in that case due diligence was not exercised with regard to the Florida and the Alabama. The consequence is inevitable.

In the extract from Sir Roundell Palmer's speech on the subject of the Alexandra, I find an expression which strikes me. He says: "You cannot stop the ship by going before a magistrate; it must be done upon the responsibility of the Government."

How? It *must* be done upon the responsibility of the Government. Then the officers of the Customs were laughing at Mr. Dudley, or else they willfully deceived him, when they recommended him to begin legal proceedings on his own (Dudley's) responsibility. Then, moreover, when Lord Russell asked Mr. Adams for evidence, the latter was entirely right in replying that he had neither the power, nor the means, of instituting legal proceedings in England. Then, too, the Government totally failed in its duty of due diligence with regard to the Florida and Alabama.

OF THE POWERS OF THE CROWN IN ENGLAND.

The Counsel of Great Britain endeavors to reply to the arguments of the United States with regard to the powers of the Crown, by raising loud cries of arbitrary power, and violation of the laws and constitution of England. Powers of the Crown.

Let us understand one another. Either England possesses the means of preventing, within her territorial jurisdiction, the belligerent enterprises of unauthorized individuals; or else she does not possess them. There is no escape from this dilemma.

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gouvernement, aux constructeurs et aux prétendus propriétaires, sans doute avec des ordres correspondants adressés aux officiers de la douane.

Le conseil de la Grande-Bretagne affirme, hautement et positivement, que les moyens adoptés sous la responsabilité du gouvernement,—c'est-à-dire, par le mouvement spontané des ministres dépositaires du pouvoir exécutif de la Couronne,—étaient parfaitement légaux et constitutionnels. Nous, conseils des États-Unis, nous sommes heureux d'être, sous ce rapport, du même avis que le conseil de la Grande-Bretagne.

Mais alors on n'a pas pratiqué les dues diligences au sujet de la Florida et de l'Alabama. La conséquence est inévitable.

Dans l'extrait du discours de Sir Roundell Palmer, au sujet de l'Alexandra, je trouve une phrase qui me frappe. Il dit: "Vous ne pouvez pas l'arrêter en allant chez un magistrat; il faut que cela se passe sous la responsabilité du gouvernement."

Comment? *il faut* que cela se passe sous la responsabilité du gouvernement! Alors les officiers de la douane se sont moqués de Mr. Dudley, ou bien ils l'ont sciemment trompé, quand ils lui ont recommandé de commencer des poursuites judiciaires sous sa propre responsabilité, à lui, Dudley. Alors aussi, quand Lord Russell a demandé des preuves à Mr. Adams, celui-ci avait mille fois raison de répondre qu'il n'avait ni le pouvoir ni les moyens d'intenter des poursuites judiciaires en Angleterre. Alors, aussi, le gouvernement a totalement failli à son devoir des dues diligences relativement à la Florida et à l'Alabama.

DES POUVOIRS DE LA COURONNE D'ANGLETERRE.

Le conseil de la Grande-Bretagne essaie de répondre aux arguments des États-Unis, relativement aux pouvoirs de la Couronne, en poussant les hauts cris, en parlant d'arbitraire et de violation des lois et de la constitution d'Angleterre.

Entendons-nous. Ou bien l'Angleterre possède les moyens d'empêcher dans sa juridiction territoriale les entreprises belligérantes d'individus non-autorisés, ou bien elle ne les possède pas. On ne peut pas échapper à ce dilemme.

If she possesses those means and does not exercise them, she is wanting in the due diligence of the Treaty.

If she does not possess them, in consequence of the impediments she has allowed her jurists to impose on her, and if she has gone so far as to abdicate all real national sovereignty, she is still wanting in the due diligence of the Treaty.

As is well said by Vattel: "If a sovereign who could retain his subjects in the rules of justice and peace suffers them to ill-treat a nation, either in its body or members, he does no less harm to the whole nation than if he ill-treated it himself."

Obligations imposed by international law as distinguished from municipal law.

As Phillimore says: "Each State has a right to expect from another the observance of international obligations, without regard to what may be the municipal means which it possesses for enforcing its observance."

As says Dana, on the subject of the law of the United States:

Our obligation arises from the law of nations, and not from our own statutes, and is measured by the law of nations. Our statutes are only means for enabling us to perform our international duty, and not the affirmative limits of that duty. We are as much responsible for insufficient machinery, when there is knowledge and opportunity for remedying it, as for any other form of neglect. Indeed, a nation may be said to be more responsible for a neglect or refusal, which is an imperial, continuous act, and general in its operation, than for neglect in a special case, which may be a fault of subordinates.

Such is the recognized law of nations. The Counsel of Great Britain admits it. Then what is the use of a dissertation on arbitrary power?

The Counsel appears to assert that what is done by any Government beyond the provisions of *a written law* is arbitrary.

Constitutional form of the British Government.

I understand this notion when speaking of a *really* constitutional Government, like Italy, Brazil, Switzerland, or the United States. In those countries the executive functionaries. King, Emperor, President, no matter what the title, and

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Si elle possède ces moyens et ne les exerce pas, elle manque aux dues diligences du traité.

Si elle ne les possède pas, à cause des entraves qu'elle a permis à ses légistes de lui imposer, et si elle en est arrivée au point d'abdiquer toute véritable souveraineté nationale, elle manque encore aux dues diligences du traité.

Comme le dit bien Vattel: "Si un souverain, qui pourrait retenir ses sujets dans les règles de la justice et de la paix, souffré qu'ils maltraitent une nation, ou dans son corps ou dans ses membres, il ne fait pas moins de tort à toute la nation que s'il la maltraitait lui-même."

Comme le dit Phillimore: "Chaque état a le droit d'attendre d'un autre l'accomplissement des obligations internationales sans égard à ce que peuvent être les moyens municipaux qu'il possède pour les faire observer."

Comme le dit Dana, à propos des lois des États-Unis:

"Notre obligation naît du droit des gens et non de nos propres statuts, et c'est du droit des gens qu'elle reçoit sa mesure. Nos statuts ne sont qu'un moyen de nous mettre en état de remplir notre devoir international, et non les limites affirmatives de ce devoir. Nous sommes autant responsables de l'insuffisance d'une machine, quand nous connaissons les moyens et avons l'occasion d'y porter remède, que de tout autre genre de négligence. Certes, on peut dire qu'une nation est plus responsable d'une négligence ou d'un refus qui est un acte souverain, continu, et ayant un caractère de généralité dans sa consommation, que d'une négligence dans un cas particulier qui peut provenir de la faute de subordonnés."

Tel est le droit des gens reconnu. Le conseil de la Grande-Bretagne l'admet. Alors, à quoi bon disserter sur l'arbitraire?

Le conseil paraît prétendre que ce qui est fait par un gouvernement quelconque en dehors des prévisions d'*une loi écrite* est l'arbitraire.

Je comprends cette idée quand on parle d'un gouvernement *véritablement* constitutionnel, comme l'Italie, comme le Brésil, comme la Suisse, comme les États-Unis. Dans ces pays, les fonctionnaires éxecutifs, Roi, Empereur, Président, n'importe le titre, et

the legislative functionaries, have each their duties and their powers traced beforehand by a written national compact. There, when the *Government*, that is to say, the totality of the national powers, acts, it acts in conformity with the compact, with the Constitution, and by means of the functionaries specially designated according to the Constitution. But where is one to find the Constitution of England? No one is ignorant that what in England is called "the Constitution" is but the combination of the legislative acts, of the recognized customs, usages, and traditions, and of the public opinion of the Kingdom. For the executive administration there is the Crown, represented by its responsible Ministers, who, in these latter times, have arrogated to themselves the title of "Government;" there is the Parliament, which makes laws and controls the Ministers, and, through them, the Crown; there are the Courts, which interpret the written laws, and which also interpret the customs, usages, and traditions having the force of law; and for public opinion, why, there are the newspapers of London.

Now, the Ministers, as holding powers from the Crown and Parliament, declare war, acknowledge foreign belligerence, conclude Treaties, recognize new States, in a word supervise and direct the foreign relations of the kingdom.

Is that *arbitrary power*? I deny it. It is the *law* which has been established by tradition, just as the existence of Parliament, the right of primogeniture, the privileges of the peerage, have been established.

But the act of a declaration of war by the Crown, or the conclusion of any Treaty, profoundly affects private interests. Among the least of its effects would be that of imposing obstacles to the departure of merchant-vessels from the ports of the kingdom. Nevertheless, in this controversy, we are asked to believe that it would be *arbitrary* to detain provisionally a merchant-vessel for the object of a simple inquiry caused by suspicions as to the legality of its equipment and destination.

Look at the power of Parliament,—there you have arbitrary power. A Parliament held to be omnipotent, which can banish and even try a

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les fonctionnaires législatifs, ont chacun leurs devoirs et leurs pouvoirs tracés d'avance par un pacte national écrit. Là, quand le *gouvernement*,—c'est-à-dire, la totalité des pouvoirs nationaux,—agit, il agit conformément au pacte, à la constitution, et par l'intermédiaire des fonctionnaires spécialement désignés d'après la Constitution. Mais où trouver la constitution de l'Angleterre? Personne n'ignore que ce qu'en Angleterre on appelle "la constitution" n'est que l'ensemble des actes législatifs, des coutumes, des usages, et des traditions reconnues, et de l'opinion publique du royaume. Pour l'administration exécutive, il y a la Couronne, représentée par ses ministres responsables, qui dans ces derniers temps se sont arrogé le titre de "gouvernement;" il y a le Parlement, qui fait des lois et qui contrôle les ministres et, par eux, la Couronne; il y les tribunaux, qui interprètent les lois écrites et qui interprètent aussi les coutumes, les usages, les traditions ayant force de lois; et, pour l'opinion, il y a, ma foi, les journaux de Londres.

Maintenant, les ministres, en leur qualité de fondés de pouvoir de la Couronne et du Parlement, déclarent la guerre, constatent la belligérance étrangère, concluent des traités, reconnaissent des états nouveaux, enfin, surveillent et dirigent les rélations extérieures du royaume.

Est-ce là de *l'arbitraire*? Je le nie. C'est *la loi*, qui s'est établie par tradition, précisément comme se sont établis l'existence du Parlement, le droit de primogéniture, les priviléges de la pairie.

Mais l'acte d'une déclaration de guerre par la Couronne, ou la conclusion d'un traité quelconque, trouble profondément les intérêts particuliers. Parmi les moindres de ses effets, serait celui d'imposer des entraves à la sortie des vaisseaux marchands des ports du royaume. Cependant, dans cette controverse, on nous invite à croire qu'il serait *arbitraire* de faire détenir provisoirement un vaisseau marchand pour les fins d'une simple enquête motivée par des soupçons sur la légalité de son équipement et de sa destination.

Le pouvoir du Parlement, voilà l'arbitraire. Un Parlement censé omnipotent, qui

King, introduce a new dynasty, abolish hereditary succession and all its legislative and judicial privileges, change the religion of the State, confiscate the goods of the Church, take from the Crown the administration of the international relations of the country,—is not this the reign of despotism?

But, up to the present time, Parliament has not taken from the Crown, that is say from the Ministers, the direction of foreign affairs. It may arrogate to itself a part of that direction, as has been done in other constutional countries; but as to assuming it entirely, that would be difficult in the present state of Europe.

I honor England. The substance, and even the forms of the institutions of the United States are borrowed from the mother-country. We are what we are, first of all, because we are of British race, language, religion, genius, education, and character. I have studied England at home, in her Colonies, in her establishments beyond the seas, and, above all, in her magnificent Indian Empire. She is rich, great, and powerful as a State, not, in my opinion, because of the subjection of her Ministers to the scrupulous and daily criticism of the House of Commons, but in spite of it, as I remember to have heard said by the late Lord Palmerston. It is not the strong, but rather the weak side of her Government, as one sees, moreover, in the present controversy. It is not worth while, therefore, to deny to the Crown executive powers necessary for the peace of the kingdom; nor, in the present case, to raise cries of arbitrary power, in the face of the admitted omnipotence, that is to say, of the absolute despotic power of Parliament, whose real force tends every day to concentrate itself more and more in the House of Commons alone.

Such a Constitution, so undefined, continues to work, thanks above all to the practical good sense of the English people, to their wholesome respect for traditions, to their special talent for government, to their praiseworthy national pride, and to the elasticity of their political forms, which allows of every one being received and placed in the *governing class*, who, no matter where within the limits of the empire, is distinguished by eminent qualities.

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peut chasser et même juger un roi, introduire une dynastie nouvelle, abolir l'hérédité et tous ses priviléges législatifs et judiciaires, changer la religion de l'état, confisquer les biens de l'église, enlever à la Couronne l'administration des relations internationales du pays,—n'est-ce pas le règne de l'arbitraire?

Mais, jusqu'à présent, le Parlement n'a pas enlevé à la Couronne,—c'est-à-dire, aux ministres,—la direction des affaires étrangères. Il peut s'arroger une partie de cette direction, comme ou l'a fait dans d'autres pays constitutionnels; mais quant à se l'arroger entièrement, ce serait difficile dans l'état actuel de l'Europe.

J'honore l'Angleterre. Le fond et même la forme des institutions des États-Unis sont empruntés à la mère-patrie. Nous sommes ce que nous sommes, d'abord parce que nous sommes de race, de langue, de religion, de génie, d'éducation et de caractère britanniques. J'ai étudié l'Angleterre chez elle, dans ses colonies, dans ses établissements d'outre-mer et surtout dans son magnifique empire des Indes. Elle est riche, grande, puissante, comme état; non, selon moi, à cause de la sujétion de ses ministres à la critique méticuleuse et journalière de la Chambre des communes, mais en dépit de cela, comme je me souviens de l'avoir entendu dire par feu Lord Palmerston. Ce n'est pas le côté fort, c'est plutôt le côté faible, de son gouvernement; on le voit du reste dans cette controverse. Il ne vaut donc pas la peine de refuser à la Couronne des pouvoirs exécutifs nécessaires à la paix du royaume, ni dans le cas actuel de crier à l'arbitraire, en présence de l'omnipotence reconnue, c'est-à-dire, de l'arbitraire absolu du Parlement, dont la force réelle tend chaque jour à se concentrer de plus en plus dans la seule Chambre des communes.

Une telle constitution, aussi indéterminée, continue de fonctionner, grâce surtout au bon sens pratique du peuple anglais, à son respect salutaire des traditions, à son génie gouvernemental particulier, à sa louable fierté nationale et à l'élasticité de ses formes politiques,—élasticité qui permet de recevoir et de placer dans la *classe gouvernante* tout ce qui, n'importe où, dans les limites de l'empire, se met en relief par des qualités éminentes.

Thus liberty and order are reconciled. But liberty and order equally require that the public peace should not be disturbed by the intrigues and mercenary interests of individuals for want of a little repressive power placed in the hands of the Crown.

Parliament in its omnipotence might easily have remedied the defects of the municipal law if it had chosen. It has since done so. But it did not do it in proper time, and this it is which constitutes a failure in the due diligence of the Treaty.

America, on the contrary, has several times done this at the right moment, in the interests of her friendly relations with Great Britain.

THE RUSSIAN SHIPS.

The British Counsel quotes and approves the opinion of the English Judges given in Fortescue's Reports. They were of opinion "that the Crown had no power by law to prohibit the building of ships of war, or ships of great force, for foreigners in any of His Majesty's dominions." (P. 18.) Case of the Russian ships.

Two Judges had given this opinion in 1713; other Judges (it is not said how many) gave the same opinion in 1721. The vessels were built for Russia, and contrary to the remonstrances of Sweden.

In 1713 there was open war between Russia and Sweden. It was four years after the battle of Pultowa. Charles XII had taken refuge in Turkey, and the Sultan was in vain endeavoring to persuade him that he ought to return to his own States.

The Elector of Hanover, who had become King of England, had just taken part in the spoliation of Charles XII. Russia had conquered Finland.

In 1714 the Russians burned and destroyed the Swedish fleet off the Island of Aland. If it is true that the Czar had had vessels of war built in England, there is no doubt that these vessels contributed to the victory of Aland.

Conclusion: that in 1713 the interests of the Elector of Hanover

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Ainsi se trouvent conciliés la liberté et l'ordre. Mais la liberté, autant que l'ordre, demande que la paix publique ne soit pas troublée par les intrigues et les intérêts mercénaires des individus, faute d'un peu de pouvoir répressif confié aux mains de la Couronne.

Le Parlement dans son omnipotence aurait bien pu remédier aux défauts de la loi municipale, s'il l'avait voulu. Il l'a fait depuis lors. Mais il ne l'a pas fait en temps utile, et c'est là ce qui constitue un manquement aux dues diligences du traité.

L'Amérique, au contraire, l'a fait plusieurs fois en temps utile, dans l'intérêt de ses relations amicales avec la Grande-Bretagne.

LES VAISSEAUX RUSSES.

Le conseil cite et approuve l'opinion des juges anglais dans les rapports de Fortescue. Ils furent d'avis "que la Couronne n'avait pas le pouvoir, selon les lois, de défendre la construction des navires de guerre, ou des navires d'une grande force, pour le compte des étrangers dans un des états de sa Majesté, (p. 16.)

Deux juges avaient émis cet avis en 1713; d'autres juges (on ne dit pas combien) émirent le même avis en 1721. On construisit les vaisseaux pour la Russie, et en opposition aux remontrances de la Suède.

En 1713, il y avait guerre ouverte entre la Russie et la Suède. C'était quatre ans après la bataille de Pultava. Charles XII s'était réfugié en Turquie, et le Sultan s'efforçait en vain de lui persuader qu'il devait retourner dans ses propres états.

L'Électeur de Hanovre, devenu Roi d'Angleterre, venait de prendre sa part dans les dépouilles de Charles XII. La Russie avait conquis la Finlande.

En 1714, les Russes brûlèrent et détruisirent la flotte suédoise devant l'île d'Aland. S'il est vrai que le Czar avait fait construire des vaisseaux de guerre en Angleterre, il est hors de doute que ces vaisseaux contribuèrent à la victoire d'Aland.

Conclusion: en 1713 les intérêts de l'Électeur de Hanovre le portaient à favoriser,

induced him to favor, or at least not to oppose, the policy of the Czar; and the opinion of the two Judges at that period were unofficial opinions of no value.

As to the opinion of 1723, the wind then blew the other way: England was in favor of Sweden; the peace of Neustadt had just been concluded; and the construction of vessels of war for the service of the Czar was no longer contrary to European international law.

To return to the question of the power of the Crown. Were they armed or unarmed vessels which were being built for the Czar? History is not explicit on this point. In the former case, there would have been, in 1713, open violation of international law. There is, then, reason to believe that these vessels were not armed.

The Report speaks of "*His Majesty's dominions.*" What dominions? England? I doubt it.

Now suppose that from 1713 till the Act of 1819, there was in England no law, no power of coercion, capable of preventing the building, equipping, arming, and sending forth of vessels of war intended to fight against a State, the friend and ally of England.

Then, during that great eighteenth century, and during no one can tell how many centuries previous, England had been entirely powerless to defend her own sovereignty, and to protect her friends against the crimes of foreigners making her territory the base of their belligerent operations.

I do not believe, I will never believe, that such was the national impotence of England, and I do not understand how any one can attempt to push the exaggeration of private liberty so far as to annihilate all national sovereignty, and to make England the involuntary accomplice of all the maritime wars of Europe.

Consequently, I leave out of the question the opinions reported by Fortescue. It is not my business to fathom this mystery, but assuredly a mystery there is; and I beg the Arbitrators to be so good as to consult the numerous contrary opinions collected in Note (B) annexed to the Argument for the United States.

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ou tout au moins à ne pas entraver, la politique du Czar; et l'avis des deux juges d'alors étaient des avis officieux, sans valeur aucune.

Quant à l'avis de 1723, le vent avait alors tourné: l'Angleterre favorisait la Suède; la paix de Neustadt venait d'être conclue; et la construction des vaisseaux de guerre pour le service du Czar n'était plus en conflit avec le droit des gens de l'Europe.

Revenons à la question du pouvoir de la Couronne. Étaient-ce des vaisseaux armés en guerre ou des vaisseaux non armés en guerre qu'on construisit pour le Czar? L'histoire n'est pas explicite sur ce point. Dans le premier cas, il y aurait eu, en 1713, violation manifeste du droit des gens. Donc, il y a lieu de croire que ces vaisseaux n'étaient pas armés en guerre.

Le rapport parle "*des états de sa Majesté.*" Quels états? L'Angleterre? J'en doute.

Or, supposons que, depuis 1713 jusqu'à la loi de 1819, il n'y ait eu en Angleterre aucune loi, aucun pouvoir coercitif, capables d'empêcher dans ses ports la construction, l'équipement, l'armement et l'expédition des vaisseaux de guerre destinés à combattre contre un état ami et allié de l'Angleterre.

Alors, durant ce grand dix-huitième siècle, et durant on ne sait combien de siècles antérieurs, l'Angleterre aurait vécu dans un état de complète impuissance à défendre sa propre souveraineté et à protéger ses amis contre les attentats des étrangers qui faisaient de son territoire la base de leurs opérations belligérantes.

Je ne crois pas, je ne croirai jamais, que telle ait été l'impuissance nationale de l'Angleterre, et je ne comprends pas qu'on veuille pousser l'exagération de la liberté privée jusqu'au point d'annihiler toute souveraineté nationale, et de faire de l'Angleterre la complice involontaire de toutes les guerres maritimes de l'Europe.

Par conséquent, j'écarte de la question les opinions rapportées par Fortescue. Je n'ai pas à pénétrer ce mystère; mais assurément il y a un mystère; et je prie les arbitres de vouloir bien consulter les nombreux avis contraires rassemblés dans la note (B) annexée au plaidoyer des États-Unis.

LAWS OF FOREIGN COUNTRIES.

The British Case had affirmed that the United States and Great Britain were the only two countries having municipal laws fitted to secure the observance of neutrality. In reply to this assertion we have quoted and commented on the laws of various foreign countries, and the observations of jurists of those countries; and these quotations prove that such laws exist everywhere throughout Europe and America. Comparative laws of other countries.

The British Counsel disputes this proposition on the ground of the *brevity* of most of these foreign laws, and of the imperfect judgment of a Netherlands statesman, without closely examining the text of these laws, or the commentaries of native jurists which establish their true nature.

In this the British Counsel misapprehends the characteristic quality of all the laws of these countries, I mean their brevity, when compared with the laws of Great Britain, and of her imitators, the United States.

In all the laws called "neutrality laws," of whatever country, there are two principal objects: first, to defend the national territory against any encroachment on the part of foreigners; and, secondly, to prevent individuals, whether natives or foreigners, from committing on their own authority acts of hostility to foreigners on the national territory, which might expose the State to a declaration of war, or to reprisals on the part of another State.

Such are the provisions of many codes; as, for example, those of France, Italy, the Netherlands, Portugal, Spain, and Belgium.

It is obvious that these provisions of the penal codes of the different countries of Europe comprise the same subject, and have the same objects as the English and American law; omitting, however, the details of procedure. But in France, in Italy, and elsewhere, the rules of procedure are to be found in the codes of procedure, and it becomes useless and inexpedient to repeat these rules with regard to each article of the penal code.

DES LOIS DES PAYS ÉTRANGERS.

Le mémoire de la Grande-Bretagne avait affirmé que les États-Unis et la Grande-Bretagne sont les deux seuls pays qui aient des lois municipales propres à assurer l'observation de la neutralité. En réponse à cette assertion, nous avons cité et commenté les lois de divers pays étrangers et les observations des juristes de ces pays; et ces citations démontrent que de telles lois existent partout en Europe et en Amérique.

Le conseil conteste cette proposition en se fondant sur la *brièveté* de la plupart de ces lois étrangères, et sur l'appréciation imparfaite d'un homme d'état néerlandais, sans examiner de près le texte de ces lois, ainsi que les commentaires de juristes nationaux qui en établissent la véritable nature.

En ceci, le conseil se méprend sur la qualité caractéristique de toutes les lois de ces pays; je veux dire leur brièveté comparativement aux lois de la Grande-Bretagne et de ses imitateurs, les États-Unis.

Dans toutes les lois dites "de neutralité," dans quelque pays que ce soit, il y a deux objets capitaux: premièrement, défendre le territoire national contre tout empiétement de la part des étrangers; et, secondement, empêcher des individus, nationaux ou étrangers, de commettre de leur propre autorité des actes d'hostilité étrangère sur le territoire national, pouvant exposer l'état à une déclaration de guerre ou à des représailles de la part d'un autre état.

Telles sont les prévisions de plusieurs codes, comme, par exemple, ceux de France, d'Italie, des Pays-Bas, de Portugal, d'Espagne et de Belgique.

Il saute aux yeux que ces prévisions des codes pénaux des divers pays de l'Europe embrassent le même sujet et ont les mêmes objets que la loi anglaise et que la loi américaine, en omettant toutefois les détails de procédure. Mais, en France, en Italie et ailleurs, on trouve les règles de procédure dans les codes de procédure, et il devient inopportun et inutile de répéter ces règles à propos de chaque article du code pénal.

The Netherlands Minister, in the dispatch referred to, points out the neutrality law of his country after having inconsiderately said that no such law existed. It is only on a quibble of words that the British Counsel bases the extravagant inferences to which this dispatch has given rise. But the Netherlands law is copied from the French Penal Code. It is impossible to mistake its tenor and signification.

Moreover, this law is commented on at length by French writers of undisputed authority, Dalloz, Chauveau and Hélie, Bourguignon, Carnot, and others, who all express themselves entirely in the sense of our Argument. All this will be found in the documents annexed to our Counter Case. And we have added an opinion by the late M. Berryer, which shows that these articles of the French code apply to certain proceedings of the Confederates in France with regard to the equipment of vessels of war, proceedings entirely identical with those which took place in England, (Counter Case of the United States, French translation, p. 490.)

In support of this conclusion we have cited decisions of the French Courts.

It is the same with Italy: we have quoted Italian commentators in support of our proposition, and these commentators, in explaining their own law, adopt the conclusions of the French commentators.

The same ideas are found in the Spanish and Portuguese commentators on the subject of the similar provisions of their codes. We cite Silva Ferrao, for Portugal, and Pacheco and Gomez de la Serna, for Spain, (*ubi supra*, pp. 553, 576.) These commentators reason as well as we, it seems to me, on the subject of military expeditions and privateers. I do not understand this contemptuous tone on the subject of foreign laws. It cannot be believed that all juridical knowledge, all morality of thought in legislative matters, are the exclusive and absolute property of England and the United States.

The British Counsel passes very lightly over the laws of Switzerland and Brazil.

On a study of the laws of Brazil it is found that the definitions of

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Le ministre néerlandais, dans la dépêche citée, signale la loi de neutralité de son pays, après avoir dit inconsidérément qu'il n'existait pas de loi pareille. Ce n'est que sur une équivoque de mots que le conseil fonde les inductions extravagantes auxquelles cette dépêche a donné lieu. Mais la loi néerlandaise est copiée sur le code pénal français. Il est impossible de se méprendre sur sa teneur et sa signification.

De plus, cette loi est longuement commentée par des écrivains français d'une autorité incontestée, Dalloz, Chauveau et Hélie, Bourguignon, Carnot et autres, qui tous abondent dans la sense de notre plaidoyer. Tout cela se trouve dans les pièces justificatives annexées à notre contre-mémoire. Et nous y avons ajouté une consultation de feu M. Berryer qui démontre que ces articles du code français s'appliquent à certaines menées des confédérés en France au sujet de l'équipement des bâtiments de guerre, menées en tout identiques à celles qui ont eu lieu en Angleterre, (contre-mémoire des États-Unis, tr. française, p. 490.)

À l'appui de cette conclusion nous avons cité dés décisions des tribunaux français.

Il en est de même pour l'Italie: nous avons cité des commentateurs italiens à l'appui de notre proposition; et ces commentateurs, en expliquant leur propre loi, adoptent les conclusions des commentateurs français.

On retrouve les mêmes idées dans les commentateurs espagnols et portugais au sujet de prévisions semblables de leurs codes. Nous citons Silva Ferrao, pour le Portugal, et Pacheco et Gomez de la Serna, pour l'Espagne, (*ubi supra*, pp. 553, 576.) Ces commentateurs raisonnent aussi bien que nous, ce me semble, au sujet des expéditions militaires et des corsaires. Je ne conçois pas ces allures dédaigneuses au sujet des lois étrangères. Il ne faut paut croire que tout savoir juridique, que toute moralité des idées législatives, soient l'apanage exclusif et absolu de l'Angleterre et des États-Unis.

Le conseil glisse très-légèrement sur les lois de la Suisse et du Brésil.

En étudiant les lois du Brésil on y trouve que les définitions des crimes de cette

crimes of this category are more comprehensive and more complete than those of the laws of England, (*ubi supra*, p. 594.)

Among the documents annexed to the British Case are two letters which furnish matter for reflection.

Sir A. Paget, British Minister in Portugal, acknowledging the receipt of a dispatch from the Portuguese Minister of State, adds:

> There is one point, however, upon which Her Majesty's Government are most desirous of information, to which your Excellency's note and the inclosures it contains do not refer, namely, what laws or regulations, or any other means, are at the disposal of the Portuguese Government for preventing within its territory any acts which would be violations of the Portuguese neutrality laws, as contained in the declarations of neutrality which your Excellency has transmitted to me?

And M. Cazal Ribeiro replies as follows:

> In reply, it is my duty to state to your Excellency that the laws and regulations in the matter are those which were inclosed in my note of the 25th of that month, or were mentioned in those documents, and the means of execution, in the case of any violation of neutrality, are criminal proceedings, the use of force, complaints addressed to foreign Governments, or any other means, in order to meet some particular occurrence.

I can well believe it. Where there is a will the means are not wanting.

The British Counsel is mistaken when he maintains that the United States do not understand these laws, so clearly commented on by the writers referred to, and applied by courts of law and jurists with at least as much learning as the corresponding laws of England.

As for Switzerland, we have collected in our evidence valuable documents showing the zeal and good-will with which that Republic maintains its neutrality in the midst of the great wars of Europe.

I beg also to refer to the explanations of the law of Switzerland by the Federal Council, on the occasion of the Concini affair, to show that the Counsel of Great Britain is utterly mistaken in his appreciation of

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catégorie sont plus compréhensives et plus complètes que celles des lois d'Angleterre, (*ubi supra*, p. 594.)

Parmi les pièces annexées au mémoire britannique, il y a deux lettres qui donnent à réfléchir.

Sir A. Paget, ministre anglais en Portugal, en accusant réception d'une dépêche du ministre d'état portugais, ajoute:

"Il y a néanmoins un point sur lequel le gouvernement de sa Majesté désire beaucoup avoir des renseignements, et auquel la note de votre excellence et les pièces qu'elle renferme n'ont pas trait, c'est, à savoir, quelles lois ou quels règlements, ou quels autres moyens, sont à la disposition du gouvernement portugais pour empêcher sur son territoire les actes qui seraient en violation avec (*sic*) les lois de la neutralité portugaise, comme il est contenu dans les déclarations que votre excellence m'a transmises?"

Et M. Cazal Ribeiro répond comme suit:

"En réponse, il est de mon devoir d'informer votre excellence que les lois et les règlements sur cette matière sont ceux qui étaient contenus dans ma note du 25 de ce mois ou mentionnés dans ces documents; et les moyens d'exécution, dans le cas d'une violation de neutralité, sont des procédures criminelles, l'emploi de la force, les plaintes adressées aux gouvernements étrangers ou d'autres moyens pouvant amener quelques circonstances particulières."

Je le crois bien. Là où la volonté se trouve, les moyens ne manquent pas.

Le conseil se trompe quand il soutient que les États-Unis ne comprennent pas ces lois commentées si clairement par des écrivains cités, et appliquées par des tribunaux et des jurisconsultes du moins aussi savamment que les lois correspondantes de l'Angleterre.

Pour la Suisse, nous avons rassemblé dans nos pièces justificatives des documents précieux, qui démontrent le zèle et la bonne volonté que cette république apporte au maintien de sa neutralité au milieu des grandes guerres européennes.

Je cite aussi l'explication des lois de la Suisse donnée par le Conseil fédéral à propos de l'affaire Concini, pour démontrer que le conseil de la Grande-Bretagne se méprend

these laws, as well as of those of Italy and Brazil. ("Droit public suisse," vol. i, p. 459.)

Now, I appeal to the honorable Arbitrators: let them judge and decide which is right with regard to these laws,—Great Britain relying upon an equivocal expression in a diplomatic dispatch, or the United States, who rely upon the text of these laws and on the commentaries of the best jurists of France, Italy, Spain, Portugal, and Brazil.

I refer particularly to the honorable Arbitrators on the question whether the institutions of England are in reality more constitutional than those of Italy, Brazil, and Switzerland. According to the opinion of the British Counsel, these countries possess no neutrality laws. But they observe the duties of neutrality, and they observe them without infringing their Constitution. Which then is mistaken with regard to them? England or America?

THE LAWS OF THE UNITED STATES.

The laws of the United States examined.

The Counsel of Great Britain devotes much space to the discussion of the laws of the United States. I shall, I think, require less time to reply to his Argument.

The Counsel endeavors to prove that the law of the United States, in so far as it relates to this question, is limited to the case of an armed vessel.

With this object he quotes expressions from the third section of the law, which enacts certain penalties against "any person who shall, within the limits of the United States, fit out and *arm*, or attempt to fit out and *arm*, or shall knowingly be concerned in the *furnishing*, *fitting out*, or arming of any vessel," with intent that such ship or vessel should be employed in the service of a belligerent foreign Power.

Arguing from these expressions in the law he believes that to constitute an offense the vessel must have been armed, or an attempt must have been made to arm her.

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du tout au tout dans son appréciation de ces lois aussi bien que dans l'appréciation de celles de l'Italie et du Brésil, (Droit public suisse, tome i, p. 459.)

Maintenant, je me rapporte aux honorables arbitres; qu'ils jugent et décident qui a raison, au sujet de ces lois, de la Grande-Bretagne, se fondant sur un mot équivoque dans une dépêche diplomatique, ou des États-Unis, se fondant sur le texte même des lois et les commentaires des meilleurs jurisconsultes de la France, de l'Italie, de l'Espagne, du Portugal et du Brésil.

Je m'en réfère surtout aux honorables arbitres pour savoir si les institutions de l'Angleterre sont vraiment plus constitutionelles que celles de l'Italie, du Brésil, de la Suisse. D'après l'opinion du conseil de la Grande-Bretagne, ces pays ne possèdent pas des lois de neutralité. Mais ils observent les devoirs de la neutralité, et ils les observent sans porter atteinte à leur constitution. Qui donc se trompe à leur égard? Est-ce l'Angleterre? Est-ce l'Amérique?

LES LOIS DES ÉTATS-UNIS.

Le conseil de la Grande-Bretagne consacre beaucoup d'espace à la discussion des lois des États-Unis. Il me faudra, je crois, moins de temps pour répondre à son argumentation.

Le conseil s'efforce de prouver que la loi des États-Unis, en tant ce qui regarde la question, est limitée au cas d'un vaisseau armé en guerre.

À cet effet, il cite les expressions du 3me article de la loi, qui frappe de certaines peines "toute personne qui dans les frontières des États-Unis équipe et arme *en guerre*, ou tâche d'équiper et *armer en guerre*, ou prend une part intelligente à *l'approvisionnement*, *l'équipement* ou l'armement en guerre d'aucun navire ou bâtiment," dans le but d'employer ce navire ou bâtiment au service d'une puissance belligérante étrangère.

Appuyé sur ces expressions de la loi, il croit que pour constituer le crime il faut que le navire ait été armé en guerre ou qu'on ait tenté de l'armer en guerre.

But as a question of jurisprudence this interpretation of the law is entirely erroneous. It is established in the United States that it is not the nature of the preparations which constitutes the offense, but the intention which dictates the acts. The doctrine is thus stated by Dana:

As to the preparing of vessels within our jurisdiction for subsequent hostile operations, the test we have applied has not been the extent and character of the preparations, but the intent with which the particular acts are done. If any person does any act, or attempts to do any act, toward such preparation, with the intent that the vessel shall be employed in hostile operations, he is guilty, without reference to the completion of the preparations or the extent to which they may have gone, and although his attempt may have resulted in no definite progress toward the completion of the preparations, the procuring of materials to be used knowingly and with intent, &c., is an offense. Accordingly it is not necessary to show that the vessel was armed, or was in any way, or at any time, before or after the act charged, in a condition to commit acts of hostility.

No cases have arisen as to the combination of materials which, separated, cannot do acts of hostility, but, united, constitute a hostile instrumentality; for the intent covers all cases and furnishes the test. It must be immaterial where the combination is to take place, whether here or elsewhere, if the acts done in our territory—whether acts of building, fitting, arming, or of procuring materials for these acts—be done as part of a plan by which a vessel is to be sent out with intent that she shall be employed to cruise. (Argument of the United States, pp. 363, 364.)

These extracts from Dana are authoritative on the question. The true interpretation of the law has been laid down in a decision of the Supreme Court of the United States. The Court determined "that it is not necessary that the vessel should be armed or in a condition to commit hostilities on leaving the United States." (United States *vs.* Quincy, Peters's Reports, vol. vi, p. 445; *vide* Opinions, vol. iii, pp. 738, 741.)

Such is the law as understood and practiced in America. Two of the Counsel of the United States, Mr. Evarts and myself, have administered

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Mais, en matière de jurisprudence, cette interprétation de la loi est parfaitement erronée. Il est établi aux États-Unis que ce n'est pas le caractère des préparatifs qui constitue le crime, mais l'intention qui préside aux actes. La doctrine est exposée par Dana, comme suit:

"Quant à la préparation de navires dans notre juridiction pour des actes d'hostilité ultérieurs, le critérium que nous invoquons n'est pas l'étendue et le caractère des préparatifs, mais l'intention qui préside aux actes particuliers. Si une personne accomplit ou tente d'accomplir un acte tendant à ces préparatifs dans l'intention que le navire soit employé à des actes d'hostilité, cette personne est coupable, sans qu'on ait égard à l'achèvement des préparatifs ou au degré auquel ils peuvent avoir été poussés, et quoique sa tentative n'ait en rien fait avancer l'achèvement de ces préparatifs. Fournir des matériaux dont il doit être fait usage, en connaissance de cause et avec intention, constitue un délit. C'est pourquoi il n'est pas nécessaire de démontrer que le navire était armé, ou était, jusqu'à un certain point, ou à n'importe quelle époque avant ou après l'acte incriminé, en état de commettre des actes d'hostilité.

"On n'a point soulevé de litiges relativement à la réunion des matériaux qui, pris isolément, ne peuvent servir à des actes d'hostilité, mais qui, réunis, constituent des instruments d'hostilité; car l'intention couvre tous les cas et fournit le critérium de la culpabilité. Peu importe où la réunion doit avoir lieu, dans tel endroit ou dans tel autre, si les actes commis sur notre territoire,—qu'il s'agisse de construction, d'équipement, d'armement ou de fourniture de matériaux pour ces actes,—font partie d'un plan par suite duquel un navire doit être expédié dans le but d'être employé en croisière." (Plaidoyer des États-Unis, pp. 349, 350.)

Ces extraits de Dana font autorité dans la matière. La véritable interprétation de la loi a été établie par une décision de la Cour suprême des États-Unis. La Cour a déterminé "qu'il n'est pas nécessaire que le vaisseau soit armé ou dans une condition qui lui permette de commettre dès hostilités au moment de son départ des États-Unis." (United States *vs.* Quincy, Peters's Reports, vol. vi, p. 445; *vide* Opinions, vol. iii, pp. 738, 741.)

Telle est la loi comme on l'entend et comme on la pratique en Amérique. Deux des conseils des États-Unis, M. Evarts et moi-même, avons administré le Département de

the Department of Justice, and we have so personal a knowledge of this law that we also can speak authoritatively on the subject. I affirm that the interpretation of this law propounded by the British Counsel is absolutely contrary to the interpretation recognized in the United States.

I beg to call attention to the expressions of the temporary Act of 1838, reported by myself to the Congress of the United States. That Act allows the seizure "of any vessel or *vehicle*," armed or unarmed, when there are any circumstances which give probable cause to believe that such "vessel or vehicle" is intended for military operations against a foreign State. (United States Statutes, vol. v, p. 213.)

This Act had been drawn up according to the received interpretation of the permanent Act.

It follows that the whole structure of criticism which is built up by the Counsel on the subject of the preventive powers of the President of the United States falls to the ground. He supposes that that power is limited to the case of an armed vessel, because he supposes that the penal clauses have only that extent. He is mistaken on both points. The preventive powers of the President apply to all cases within the Act, to "all the prohibitions and penalties of the Act." Now the Act does not require that the vessel should be armed; it is sufficient that its owner should have an intention of employing it in acts of hostility against a Power friendly to the United States.

The case of Gelston *vs.* Hoyt, cited by the British Counsel, relates only to the manner of exercising the preventive powers of the law, and in no way affects the powers themselves.

In the documents annexed to the Counter Case of the United States will be found numerous examples of the exercise of this preventive power by the President. The fact of being armed or not is only a circumstance which bears with more or less weight on the real question,—that of the intentions of the owner of the vessel.

The British Counsel enumerates the cases in which adventurers have at different dates evaded the American law.

We have protested in our Argument, and we continue to protest,

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la Justice, et nous avons de cette loi une connaissance si personnelle que nous aussi pouvons en parler d'autorité. J'affirme que l'interprétation de cette loi émise par le conseil est absolument contraire à l'interprétation reconnue aux États-Unis.

J'appelle l'attention sur les expressions de la loi temporaire de 1838, rapportée par moi-même au Congrès des États-Unis. Cette loi permet la saisie "de tout vaisseau ou *véhicule*," armé ou non-armé, quand il y a des circonstances quelconques qui permettent de croire que ce "vaisseau ou véhicule" est destiné à des opérations militaires contre un état étrangeré. (United States Statutes, vol. v, p. 213.)

Cette loi avait été rédigée selon l'interprétation reçue de la loi permanente.

Il s'ensuit que tout l'échafaudage de critique que le conseil construit au sujet des pouvoirs préventifs du Président des États-Unis s'écroule. Il suppose que ce pouvoir est limité au cas d'un vaisseau armé en guerre, parcequ'il suppose que les clauses pénales n'ont que cette étendue. Il se trompe sur chaque point. Le pouvoir préventif du Président s'applique à tous les cas de la loi, à "toutes les prohibitions et pénalités de la loi." Or, la loi n'exige pas que le vaisseau soit armé en guerre; il suffit que son propriétaire ait l'intention de l'employer dans des actes d'hostilité contre un état ami des États-Unis.

Le cas de Gelston *vs.* Hoyt, cité par le conseil, ne touche que la manière d'exercer les pouvoirs préventifs de la loi, et il n'affecte en rien les pouvoirs eux-mêmes.

Dans les pièces justificatives annexées au contre-mémoire des États-Unis se trouvent de nombreux exemples de l'exercice de ce pouvoir préventif par le Président. Le fait d'être armé ou non n'est qu'une circonstance qui pèse avec plus ou moins de poids sur la vraie question, la question des intentions du propriétaire du vaisseau.

Le conseil énumère les cas, de dates diverses, où des aventuriers se sont soustraits à la loi américaine.

Nous avons protesté dans notre plaidoyer, et nous persistons à protester, contre

against the applicability of such arguments. England is before the Tribunal, charged with having been wanting in the due diligence required by the Conventional Rules of the Treaty of Washington. Whether America has failed or not in her neutral duties according to the law of nations, is not the question submitted to the Tribunal. America will answer for her acts at the proper time and place to those whom they may have injured.

The Counsel has quoted extracts from the correspondence of officers of the United States having reference to legal questions, which arise from time to time in the application of the law. These questions are, doubtless, similar to questions which arise in England. Unfortunately, the American law, though anterior to the English one, originates in a school of legislation common to both countries, which gives much work both to the lawyers and to the Courts.

We have discussed these questions in our Argument. But we cannot discuss in detail all these facts laboriously amassed by the British Counsel without longer preparation, which we do not wish to ask of the Tribunal.

The capital question is that of the powers of the President. The matter is elucidated by Dana. He says:

> As to penalties and remedies, parties guilty are liable to fine and imprisonment; and the vessel, her apparel and furniture, and all materials procured for the purpose of equipping, are forfeit. In cases of suspicion revenue officers may detain vessels, and parties may be required to give security against the hostile employment; and the President is allowed to use the Army and Navy or militia, as well as civil force, to seize vessels, or to compel offending vessels, not subject to seizure, to depart from our ports. What vessels shall be required to depart is left to the judgment of the Executive. (Argument of the United States, p. 168.)

A single example is sufficient to give an idea of the admitted extent of the powers of the President.

Spain was having built, in the ship-yards at New York, thirty gunboats, intended to operate against the insurgents of the island of Cuba.

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l'opportunité de tels arguments. L'Angleterre est devant le tribunal, accusée d'avoir manqué aux dues diligences des règles conventionnelles du traité de Washington. Si l'Amérique a failli ou non à ses devoirs de neutralité d'après le droit des gens, là n'est pas la question soumise au tribunal. L'Amérique répond en temps et lieu de ses actes à ceux à qui ils ont pu nuire.

Le conseil a cité des extraits de la correspondance des officiers des États-Unis, ayant rapport aux questions légales, qui surgissent de temps en temps dans l'application de la loi. Ces questions sont, sans doute, analogues aux questions qui se présentent en Angleterre. Malheureusement la loi américaine, quoique antérieure à la loi anglaise, sorte d'une école de législation commune aux deux pays, ce qui donne beaucoup à faire aux jurisconsultes et aux tribunaux.

Nous avons discuté ces questions dans notre plaidoyer. Mais nous ne pouvons discuter en détail tous ces faits, laborieusement amassés par le conseil, sans une plus longue préparation: ce que nous ne voulons pas demander au tribunal.

La question capitale est celle des pouvoirs du Président. La matière est élucidée par Dana. Il dit:

> "Quant aux peines et aux réparations à infliger, les coupables sont passibles d'amende et d'emprisonnement, et le navire, son équipement et ses meubles, ainsi que tous les matériaux fournis pour son équipement, sont confisqués. En cas de soupçon, les employés des douanes peuvent détenir les navires, et l'on peut exiger que les parties intéressées fournissent caution pour répondre qu'elles ne l'emploieront point à des actes d'hostilité; et le Président a la faculté d'employer l'armée et la marine, ou la milice, ainsi que les forces civiles, pour saisir les navires, ou pour contraindre les navires coupables qui ne sont pas sujets à la saisie à sortir de nos ports. Il est laissé à la discrétion de l'exécutif de juger quels sont les navires dont on doit exiger le départ." (Plaidoyer américain, p. 350.)

Un seul exemple suffit pour donner une idée de l'étendue reconnue des pouvoirs du Président.

L'Espagne faisait construire dans les chantiers de New York trente canonnières destinées à opérer contre les insurgés de l'île de Cuba. C'étaient des vaisseaux impropres

They were vessels unfitted for long voyages. They were not armed, and had on board neither cannon, nor gun-carriages, nor any other engine of warfare. War existed *de jure*, if not *de facto*, between Spain and Peru. The Minister of Peru, in the United States, lodged a complaint on the subject of these gun-boats. He did not pretend that they were intended to operate against Peru, since they could not round Cape Horn. But he asserted that if used to guard the coasts of Cuba, they would free from that service other vessels, which might thus attack Peru.

The President admitted this argument, and ordered the detention of the whole thirty vessels, until Spain and Peru had settled their differences through the mediation of the United States.

JURISDICTION OF THE TRIBUNAL.

A question of diligence presents itself with regard to an erroneous decree of a Court of Admiralty of Nassau.

I lay down as principle that the Government which institutes legal proceedings, and submits, without appeal, to an erroneous decree, has not the right of pleading this decree as an excuse for subsequent wrongs belonging to the same class of facts. It is, in my opinion, a double failure in the due diligence prescribed by the Rules of the Treaty. I abstain from discussing this question.

But I affirm that the erroneous decree is in no way binding. This, indeed, is evident. Furthermore, and above all, I affirm that the decree is in no way binding on an international Tribunal.

The principle is laid down and sufficiently discussed in Rutherforth's Institutes, an English work of merit and authority.

Wheaton and other writers adopt also the views of Rutherforth.

The question was raised by the English and American Commissioners nominated to carry out the stipulations of Jay's Treaty. The following

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à de longues courses. Ils n'étaient pas armés, et n'avaient à bord ni canons, ni affûts' ni aucun autre engin de combat. La guerre existait de droit, sinon de fait, entre l'Espagne et le Pérou. Le ministre du Pérou aux États-Unis porta plainte au sujet de ces canonnières. Il ne prétendit pas qu'elles fussent destinées à opérer contre le Pérou, attendu qu'elles ne pouvaient pas passer le cap Horn. Mais il prétendit qu'appliquées à la garde des côtes de Cuba, elles libéreraient de ce service d'autres vaisseaux, qui pourraient ainsi attaquer le Pérou.

Le Président se rendit à ces raisons et ordonna la détention en bloc de ces trente vaisseaux, jusqu'à ce que l'Espagne et le Pérou eussent réglé leurs différends, grâce à la médiation des États-Unis.

JURIDICTION DU TRIBUNAL.

Une question des diligences se présente au sujet d'un décret erroné d'une cour d'amirauté de Nassau.

Je pose en principe que le gouvernement qui intente des poursuites judiciaires, et qui se soumet, sans appeler, à un décret erroné, n'a pas le droit d'alléguer ce décret pour excuser des torts ultérieurs appartenant à la même classe de faits. C'est, je crois, faillir doublement aux dues diligences prescrites par les règles du traité. Je m'abstiens de discuter cette question.

Mais j'affirme que le décret erroné ne lie en aucune manière. Cela, du reste, est évident. De plus, j'affirme surtout que le décret ne lie d'aucune manière un tribunal international.

Le principe se trouve énoncé et suffisamment discuté dans les Instituts de Rutherforth, ouvrage anglais de mérite et d'autorité.

Wheaton, et d'autres écrivains d'autorité, eux aussi, adoptent les vues de Rutherforth.

La question a été soulevée par les commissaires anglais et américains, nommés pour statuer sur des stipulations du traité dit de Jay. La circonstance suivante est

circumstance is reported in the memoirs of Mr. Trumbull, one of the Secretaries of that Commission. It appears that, being in doubt, the Commissioners consulted the Earl of Loughborough, then Lord Chancellor. The latter decided that the Commissioners, in their capacity of an international tribunal, possessed complete jurisdiction to revise the decrees of any municipal tribunal, and to decree compensation to the Government injured in its interests or in those of its subjects. The Commissioners acted accordingly.

I conceive that such is the jurisdiction recognized in the case of private claims by numerous international Commissions which have since set in England and America.

CONCLUSION.

I have now treated some of the questions argued by the Counsel of Great Britain, solely to relieve my conscience. I do not think they are of a nature to exercise preponderating influence on the conclusions of the Arbitrators. The Rules of the Treaty are decisive in all the questions raised by the United States. If those Rules are the true expression of the law of nations, as I am convinced they are, well and good; if they exceed the law of nations, they necessarily constitute the conventional law of the Tribunal.

The interpretation of the municipal law of England is of little moment. Of still less moment is the interpretation of the law of the United States. The laws of other European States are of no importance whatever. The conduct of the United States toward Spain or Mexico, or even toward Great Britain, is not here in question. There is but one single question, and it is this: Has England failed or not in the due diligence required by the Treaty of Washington?

The United States are here maintaining principles which are, in their opinion, of great importance to all maritime nations, and especially to

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rapportée dans les mémoires de M. Trumbull, l'un des secrétaires de cette commission. Il paraît que, dans le doute, les commissaires ont consulté le Comte de Loughborough, grand chancelier d'alors. Celui-ci décida que les commissaires, en leur qualité de tribunal international, possédaient une juridiction complète pour réviser les décrets d'un tribunal municipal quelconque et de faire droit au gouvernement lésé dans ses intérêts ou dans ceux de ses sujets. Les commissaires ont agi en conséquence.

J'estime que telle est la juridiction reconnue, dans le cas de réclamations particulières, par de nombreuses commissions internationales qui ont siégé depuis lors en Angleterre et en Amérique.

CONCLUSION.

Je viens de traiter quelques-unes des questions posées par le conseil de la Grande-Bretagne uniquement pour l'acquit de ma conscience. Je ne crois pas qu'elles soient de nature à exercer une influence prépondérante sur les conclusions des arbitres. Les règles du traité sont décisives dans toutes les questions soulevées par les États-Unis. Si ces règles sont l'expression vraie du droit des gens, comme j'en suis convaincu, c'est bien; si elles dépassent le droit des gens, elles constituent forcément le droit conventionnel du tribunal.

Peu importe l'interprétation de la loi municipale d'Angleterre. L'interprétation de la loi des États-Unis importe moins encore. Les lois des autres états de l'Europe n'importent en rien. La conduite des États-Unis envers l'Espagne ou le Mexique, ou même envers la Grande-Bretagne, n'est pas ici en cause. Il n'y a qu'une seule question, et la voici: L'Angleterre a-t-elle failli, oui ou non, aux dues diligences requises par le traité de Washington?

Les États-Unis soutiennent ici des principes qui sont, à leur avis, d'une haute im-

Great Britain, still more so than to the United States. In consequence, we await, with respect and submission, but also without uneasiness, the judgment of this august Tribunal.

C. CUSHING.

NOTE.

In case the Arbitrators should think it worth while to study the subject attentively, we refer them to the following documents, which clearly prove the spontaneous activity of the Executive at all times to prevent equipments and expeditions in contravention of the law of nations, attempted in the ports of the United States:

I.—*Counter Case of the United States and Appendix.* (*French translation.*)

	Pages.
Mr. McCulloch to Mr. Monroe	15
Do. do.	30
Mr. Monroe to Mr. Glenn	31
Mr. Glenn to Mr. Monroe	33
Mr. Rush to Mr. McCulloch	41
Mr. McCulloch to Captain Beard	43
Do. do.	45
Mr. Ingersoll to Mr. Adams	48
Mr. Robbins to Mr. Adams	53
Mr. Monroe to Mr. Fish	58
Mr. Wirt to the President	58
Mr. Swift to Mr. McCulloch	62
Mr. McCulloch to Captain Beard	63
Do. do.	69
Mr. McCulloch to Lieutenant Marshall	72
Mr. McCulloch to Captain Daniels	82

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portance pour toutes les nations maritimes, et surtout pour la Grande-Bretagne plus encore que pour les États-Unis. En conséquence, nous attendons avec respect et avec soumission, mais aussi sans inquiétude, le jugement de cet auguste tribunal.

C. CUSHING.

6 août. (Vide *Protocole XVIII.*)

NOTE.

Dans le cas où les arbitres penseraient qu'il vaut la peine d'étudier attentivement le sujet, nous les renvoyons aux documents suivants, qui démontrent jusqu'à l'évidence l'activité spontanée que l'exécutif a mise de tout temps à prévenir des équipements et des expéditions contraires au droit des gens, essayés dans les ports des États-Unis:

I.—*Contre-mémoire des États-Unis et pièces justificatives.*

	Pages.
Mr. McCulloch à Mr. Monroe	15
Mr. McCulloch à Mr. Monroe	30
Mr. Monroe à Mr. Glenn	31
Mr. Glenn à Mr. Monroe	33
Mr. Rush à Mr. McCulloch	41
Mr. McCulloch au Capitaine Beard	43
Mr. McCulloch au Capitaine Beard	45
Mr. Ingersoll à Mr. Adams	48
Mr. Robbins	53
Mr. Munroe à Mr. Fish	58
Mr. Wirt au Président	58
Mr. Swift à Mr. McCulloch	62
Mr. McCulloch au Capitaine Beard	63
Mr. McCulloch au Capitaine Beard	69
Mr. McCulloch au Lieutenant Marshall	72
Mr. McCulloch au Capitaine Daniels	82

	Pages.
Mr. McCulloch to Mr. Lowry	85
Mr. McCulloch to Mr. Jackson	86
Mr. McCulloch to Captain Webster	87
Do. do.	88
Do. do.	89
Mr. Adams to Mr. Glenn	94
Mr. McCulloch to Captain Webster	96
Do. do.	100
Do. do.	105
Mr. Sterling to Mr. Williams	106
Mr. Graham to Commodore McCauley	107
Mr. Fillmore to General Hitchcock	108
Mr. Conrad to General Hitchcock	109
Mr. Davis to General Wool	115
Mr. Cushing to Mr. Inge	115
Mr. Cushing to Mr. McKeon	118
Mr. Cushing to the President	119
Mr. Cushing to Mr. McKeon	348
Expedition of Walker	360–368
Mr. Clayton to Mr. Hall	374
Correspondence of Messrs. Clayton and Hall	378–382
Mr. Hall to Mr. Clayton	387
Mr. Clayton to Mr. Hall	391
Mr. Preston to Captain Tattnall	394
Mr. Preston to Commodore Parker	397
Report of Commander Newton	408–700
Mr. Meredith to the Collectors of Customs	418
Various proclamations	116–419–422
Correspondence relative to the monitors	425–440
Correspondence relative to the Florida	441–452

Mr. McCulloch à Mr. Lowry	85
Mr. McCulloch à Mr. Jackson	86
Mr. McCulloch au Capitaine Webster	87
Mr. McCulloch au Capitaine Webster	88
Mr. McCulloch au Capitaine Webster	89
Mr. Adams à Mr. Glenn	94
Mr. McCulloch au Capitaine Webster	96
Mr. McCulloch au Capitaine Webster	100
Mr. McCulloch au Capitaine Webster	105
Mr. Sterling à Mr. Williams	106
Mr. Graham au Commodore McCauley	107
Mr. Fillmore au Général Hitchcock	108
Mr. Conrad au Général Hichcock	109
Mr. Davis au Général Wool	115
Mr. Cushing à Mr. Inge	115
Mr. Cushing à Mr. McKeon	118
Mr. Cushing au Président	110
Mr. Cushing à Mr. McKeon	348
Expédition de Walker	360–368
Mr. Clayton à Mr. Hall	374
Correspondance de MM. Clayton et Hall	378–382
Mr. Hall à Mr. Clayton	387
Mr. Clayton à Mr. Hall	391
Mr. Preston au Capitaine Tattnall	394
Mr. Preston au Commodore Parker	397
Rapport du Commandant Newton	700
Mr. Meredith aux receveurs des douanes	418
Proclamations diverses	704–711
Correspondance relative aux *monitors*	425–440
Correspondance relative à la Florida	441–452

II.—*Correspondence relative to the Affairs of Cuba in the English Supplement to the Counter Case of the United States.*

	Pages.
The Spanish gun-boats	454–485
The case of the Orientale	3–6
The case of the R. R. Cuyler	12–16
Mr. Herron to Mr. Browning	17
Mr. Evarts to Mr. Courtney	22
Mr. Fish to Messrs. Pierrepont and Barlow	98
Do. do.	103
Correspondence of Messrs. Potestad, Davis, Milledge, and Hoar	107–116

II.—*Correspondance relative aux affaires de Cuba dans le supplément en anglais au contre-mémoire des États-Unis.*

Les canonnières espagnoles	454–485
L'affaire de l'Orientale	3–6
L'affaire du R. R. Cuyler	12–16
Mr. Herron à Mr. Browning	17
Mr. Evarts à Mr. Courtney	22
Mr. Fish à M. Pierrepont et Mr. Barlow	98
Mr. Fish à M. Pierrepont et Mr. Barlow	103
Correspondance de MM. Potestad, Davis, Milledge et Hoar	107–116

VI.—REPLY OF MR. WAITE, AUGUST 8, TO THE ARGUMENT OF SIR ROUNDELL PALMER, UPON THE SPECIAL QUESTION AS TO SUPPLIES OF COAL IN BRITISH PORTS TO CONFEDERATE SHIPS. (SEE PROTOCOL XIX.)

The "*special question as to supplies of coal in British ports to Confederate ships*," necessarily involves an examination of the facts and circumstances under which permission to take such supplies was granted.

It is not contended by the Counsel of the United States, that all supplies of coal in neutral ports to the ships of war of belligerents, are necessarily violations of neutrality, and, therefore, unlawful. It will be sufficient for the purposes of this controversy, if it shall be found that Great Britain *permitted* or *suffered* the insurgents "to make use of its ports or waters as the base of naval operations against the United States," and that the supplies of coal were obtained at such ports to facilitate belligerent operations.

1. All naval warfare must, of necessity, have upon land a "base of operations." To deprive a belligerent of that is equivalent to depriving him of the power to carry on such a warfare successfully for any great length of time. Without it he cannot maintain his ships upon the Ocean.

A base of operations essential to naval warfare.

2. A "base of operations" for naval warfare is not alone, as seems to be contended by the distinguished Counsel of Great Britain, (sec. 3, chap. iii, of his Argument,) "a place from which operations of naval warfare are to be carried into effect." It is not, of necessity, the place where the belligerent watches for, and from which he moves against, the enemy; but it is any place at which the necessary preparations for the warfare are made; any place from which ships, arms, ammunition, stores, equipment, or men are furnished, and to which the ships of the navy look for warlike supplies and for the means of effecting the necessary repairs. It is, in short, what its name implies—the support, the foundation, which upholds and sustains the operations of a naval war.

What it is.

This was the doctrine recognized by Earl Russell on the 25th of March, 1862, three days after the Florida got out from the port of Liverpool, and while the correspondence in reference to her construction and outfit was fresh in his mind. In writing to Mr. Adams, at that time, in reference to complaints made of the treatment of the United States vessel of war Flambeau at Nassau, in the month of December previous, he used this language:

> On the other hand, the Flambeau was avowedly an armed vessel in the service of the Federal Government. She had entered the port of Nassau, and had remained there for some days, without any apparent necessity for doing so, and the authorities had not been informed of the object of her visit. To supply her with coal might, therefore, *be to facilitate her* belligerent operations, and this would constitute an infraction of the neutrality prescribed by the Queen's proclamation of the 13th of May last. (Am. App., vol. i, p. 348.)

3. This "base of operations" must be within the territory of the belligerent or of his ally. A neutral which supplies it violates his neutrality, and may be treated as an ally. A bellig-

It should not be in neutral territory.

erent using without permission the territory of a neutral for such a purpose, commits an offense against the laws of neutrality, and subjects himself to the forcible expulsion of his ships of war, and to all other means of punishment and redress which may be requisite for the vindication of the offended neutral sovereign.

The insurgents had no such base within their own territory.

4. After the end of the summer of 1861, the insurgents never had any available base of operations for naval warfare within the limits of their own territory. From that time forward until the end of the contest, the United States maintained a blockade of all the insurgent ports, which was recognized by all neutral nations as lawful, and was so far effective as to prevent any vessel of war (unless the Tallahassee and Chickamauga, with perhaps some other small vessels, should be excepted) from using these ports as a base for hostile operations upon the sea. No supplies for such operations were ever obtained there, nor were any repairs effected.

It is true, the Nashville escaped through the blockade from the port of Charleston, but when she escaped she was in no condition for war, and within three days was at Bermuda in want of coal. After there taking on board a full supply, she was enabled to make her voyage of eighteen days to Southampton. The Florida ran the blockade inwards and reached Mobile, where she was detained, more than four months, by the naval forces of the United States. At the end of that time she effected an escape, but with only a short supply of coal, for within ten days after her escape she appeared at Nassau "in distress for want of coal." After having been fairly set upon her cruise from Nassau, she not unfrequently remained at sea two months and more without renewing her supply.

Great Britain knew this.

5. This was at all times known to the British Government. The blockade was the subject of frequent correspondence between Mr. Adams and Earl Russell, and was acknowledged to be sufficiently effective to bind neutrals.

The advantages of these facts to the United States.

6. By depriving the insurgents of the use of their base of naval operations at home, the United States obtained a decided and important advantage in the progress of the war. It was a war, on the part of the United States, for the suppression of a wide-spread rebellion against the authority of the Government. At the outset, the power of the insurgents appeared so great, and their organization was so complete, that, in the opinion of the British Government, it was proper they should stand before the world and be recognized as beligerents. The territory, which they claimed as their own and sought to control, embraced a large extent of sea-coast, well supplied with ports and harbors, available for all the purposes of commerce and naval warfare. In fact, it embraced two out of the five navy-yards of the United States, and a port at which extensive preparations had been made for the establishment of a sixth.

The people of the States not in rebellion, but remaining loyal to the Government, were a commercial people, and largely engaged in navigation. At the commencement of hostilities, the insurgents proclaimed their intention of making war upon this commerce. To prevent this, and to keep such ports as were in the possession of the insurgents from being used as bases of the operations for such a war, the United States at once determined to establish and effect their blockade. With the superior power and resources under the control of the Government, it was able to accomplish this work; and before the insurgents could supply themselves with ships of war, their ports were closed against all effective operations from their own territory as a base.

This advantage was one the United States had the right to retain if within their power so to do. No neutral nation could interfere to prevent it.

7. The loss which the insurgents had thus sustained at home, they endeavored to repair by the use of the ports and territorial waters of neutral nations; and, in point of fact, they did carry on substantially their entire naval warfare against the commerce of the United States from a base of operations outside of their own territory. This fact is not denied. It is entirely separate and distinct from that of "permission" or "sufferance," which only becomes important when it is sought to charge the neutral, whose territory is used, with the consequences of the use.

Efforts of the insurgents to obtain bases of operations in neutral territory.

8. Toleration by a neutral of the use of its ports and waters by the ships of war of a belligerent to facilitate the operations of his naval warfare, is equivalent to a permission to use such ports and waters as a base of naval operations.

Toleration of use equivalent to permission.

This principle was recognized by the Emperor of Brazil in his instructions to the presidents of his provinces on the 23d of June, 1863, (Brit. App., vol. i, p. 292.) It was adopted by Earl Russell on the 12th of June, 1862, after the original escape of the Florida from Liverpool, and before the commencement of the correspondence in reference to the construction and outfit of the Alabama, when, in a letter addressed to Mr. Adams, he said:

> Attempts on the part of the subjects of a neutral government to take part in a war, or to make use of the neutral territory as an arsenal or barrack for the preparation and inception of direct and immediate hostilities against a state with which their government is at peace, as by enlisting soldiers or fitting out ships of war, and so converting, as it were, neutral territory into a hostile depot or post, in order to carry on hostilities therefrom, have an obvious tendency to involve in the war the neutral government which *tolerates* such proceedings. Such attempts, if *unchecked*, might imply, at least, an indirect participation in hostile acts, and they are, therefore, consistently treated by the government of the neutral state as offenses against its public policy and safety, which may thereby be implicated. (Am. App., vol. i, p. 665.)

If such proceedings by *subjects*, when "tolerated" or "unchecked," may imply an indirect participation by the neutral in the hostile acts of a belligerent, how much stronger is the implication when the proceedings are those of the *belligerent* himself.

9. It will not be denied that "toleration," "permission," or "sufferance," by a neutral, in this connection, implies a knowledge of the act or thing tolerated, permitted, or suffered; or, that which is equivalent, a culpable neglect in employing the means of obtaining such knowledge.

Toleration implies knowledge.

10. As early as the escape of the Florida from Liverpool; on the 22d of March, 1862, the British Government had knowledge, or, to say the least, had "reasonable grounds to believe," that an effort was being made by the insurgents to supply, in part, the loss of their own ports, for all the purposes of war upon the Ocean, by the use of those of Great Britain. From that time forward it knew that the insurgents relied *entirely* upon the ports and waters of neutral nations for the success of their naval warfare. This fact was so notorious, and so well understood in Great Britain, that it was made the subject of special comment by Earl Russell in the House of Commons during the progress of the war. (Am. App., vol. v, p. 535.)

Great Britain had reasonable ground to believe that the insurgents intended to use its ports.

11. All the really effective vessels of war ever used by the insurgents were obtained from Great Britain. This is an undisputed fact. Two, certainly, the Florida and the Alabama, were constructed and specially adapted for warlike use in Great

Their effective vessels of war came from Great Britain.

Britain, under contracts for that purpose made directly with the insurgent authorities. All this was known by the British Government, long before either of these vessels, after completing their armament and receiving their commissions, appeared at any of the ports of the Kingdom, asking permission to coal or to repair; in fact, it was known before they had appeared in the ports of any nation.

For the purposes of this argument, it matters not whether Great Britain did or did not use due diligence to prevent the construction or escape of these vessels. The fact that the insurgents, in procuring them, committed an offense against the neutrality laws of the realm, and subjected themselves to punishment therefor, remains undisputed. The individual agents, who, within British jurisdiction, committed this crime against British municipal law, made themselves subject to the penalties of that law. The authorities of the insurgents, who promoted the crime, subjected themselves to such measures as Great Britain might see fit to adopt in order to resent the wrongs inflicted on her, and to cause her sovereignty to be respected.

When obtained they were useless without a base of operations.

12. When these vessels were upon the sea, armed and fitted for war, the insurgents had advanced one step towards providing themselves with the means of prosecuting a war against the commerce of the United States; but they needed one thing more to make any war they might wage successful, and that was a base of operations. Without this, the United States would still, to a limited extent, have remained in the possession of the advantages they had gained by a successful blockade. The great difficulty to be overcome was the supply of coals. To no nation could this fact be more apparent than to Great Britain, the flag of whose magnificent navy was at that time almost constantly afloat in all the principal seas of the world.

They might have been excluded from British ports.

13. Great Britain had the undoubted right, upon the discovery of these offenses committed by the insurgents against her municipal laws, and of their violations in her territory of the laws of nations, to exclude by force, if necessary, the vessels, in this manner placed upon the seas, from all the hospitalities usually accorded to naval belligerents, in the ports and waters of the kingdom.

This was the prompt decree of Brazil, when her hospitality was abused by one of these vessels. (Brit. App., vol. i, p. 293.) The Counsel of Great Britain does not deny the power of the British Government to make the same orders.

This would have prevented the injuries which followed.

14. In this way Great Britain might, to a great extent, have prevented the consequences of the original crime committed within her own jurisdiction. It was her duty to use due diligence in her own ports and waters, and, as to all persons within her jurisdiction, to prevent the departure of such a vessel from her territory. If, notwithstanding her diligence, such a vessel was constructed within, and departed from, her jurisdiction, then good faith toward a nation with which she was at peace required that she should, as far as possible, curtail the injurious consequences of the unlawful act which she had been unable to prevent. She owed no comity to a nation that had abused her hospitality. She was under no obligations to open her ports to a belligerent that had violated her neutrality. No belligerent had the right to *demand* the use of her ports for the accommodation of his ships of war. It was a privilege she could grant or not as she pleased, and if in this respect she treated both belligerents alike, neither had the right to complain. An order which excluded all guilty of the

same offense would have operated alike on all who were guilty, but would not have included the innocent.

15. The United States had the right, as they did, to demand of Great Britain, that she should use all means within her power to avoid the consequence of her failure to prevent the use of her territory for these unlawful purposes. As has been seen, the insurgents commenced in Great Britain their violations of these particular laws of neutrality. They were flagrant acts. They were accomplished in spite of the United States. They were high offenses against the authority and dignity of the government of Great Britain, and, as Earl Russell afterward said, "totally unjustifiable and manifestly offensive to the British Crown." (Am. App., vol. i, p. 631.) To permit them to pass unrebuked was to excuse them, and was to encourage future transgressions.

The United States requested Great Britain to prevent this abuse of its territory

As was subsequently, on the 27th of March, 1863, said by Mr. Adams, in a conversation with Earl Russell upon this subject:

> What was much needed in America was not solely evidence of action to prevent these armaments. It was the moral power that might be extended by the Ministry in signifying its utter disapproval of all the machinations of the conspirators against the public peace. Hitherto the impression was quite general, as well in America as in this country, that the Ministry held no common sentiment, and were quite disposed to be tolerant of all the labors of these people, if not indifferent to them. Here they were absolutely sustaining the rebels in the prosecution of the war by the advance of money, of ships, and of all the necessaries with which to carry on as well by sea as on the land; and upon such notorious offenses Ministers had never yet given out any other than an uncertain sound. *The effect of this must be obvious. It encouraged the operations of British instigators of the trouble on this side, who believed that they were connived at, and, so believing, carried on their schemes with new vigor.* (Am. App., vol. iii, p. 125.)

Nothing can add to the force of these words. Omission by the British Government to act under such circumstances was nothing less than toleration of the abuses complained of. It was, in short, an implied permission to continue the unlawful practices.

16. Great Britain not only neglected during the whole war to take any measures by which any of the offending vessels of the insurgents would be excluded from the hospitalities of her ports, and their agents prevented from using her territory for facilitating their belligerent operations, but she in effect refused so to do. She did not even send remonstrances to the government of the insurgents, or to any of its agents residing and conducting its affairs within her own jurisdiction.

Great Britain refused to prevent it.

On the 4th of September, 1862, Mr. Adams, in a communication to Earl Russell, called attention to the fact that the Agrippina, the bark which had taken a part of the armament to the Alabama, was preparing to take out another cargo of coal to her, and asked that something might be done which would prevent the accomplishment of this object. (Brit. App., vol. i, p. 209.) This communication, in due course of business, was referred to the Commissioners of Customs, who, on the 25th of the same month, reported: "That there would be great difficulty in ascertaining the intention of any parties making such a shipment, and we do not apprehend that our officers would have any power of interfering with it, were the coals cleared outward for some foreign port in compliance with the law. (Brit. App., vol. i, p. 213.) Thus the matter ended.

If there was no power in the officers of the customs to interfere with the shipment of the coals, there certainly was ample power in the Government to prohibit any offending belligerent vessel from coming into the ports of Great Britain to receive them. That, if it would not have

stopped the offending vessels entirely, might to some extent have embarrassed their operations.

Again, on the 7th of December, 1863, Mr. Adams submitted to Earl Russell evidence of the existence of a regular office in the port of Liverpool for the enlistment and payment of British subjects, for the purpose of carrying on war against the Government and people of the United States. (Brit. App., vol. i, p. 428.) This communication was by Earl Russell referred to the Law Officers of the Crown, who, on the 12th of the same month, reported: "We have to observe that the facts disclosed in the depositions furnish additional grounds to those already existing for strong remonstrance to the Confederate Government on account of the systematic violation of our neutrality by their agents in this country." (Brit. App., vol. i, p. 440.) There is no evidence tending to prove that any such remonstrance was then sent. In fact, the first action of that kind which appears in the proof was taken on the 13th day of February, 1865, less than sixty days before the close of the war.

17. The conduct of Great Britain from the commencement was such as to encourage the insurgents, rather than discourage them, as to the use of her ports and waters for necessary repairs and for obtaining provisions and coal.

Great Britain encouraged the use of its ports by the insurgents for repairs and for obtaining provisions and coal.

The Alabama first appeared in a British port, at Jamaica, on the 20th of January, 1863, nearly six months after her escape from Liverpool, and after a lapse of much more time than was sufficient to notify the most distant colonies of the offense which had been committed by her, and of any restrictions which the Government at home had seen fit to place upon her use of the hospitalities of ports of the Kingdom. No such notice was ever given, nor was any such restriction ever ordered.

The Alabama went to Jamaica for the reason that in an engagement with the Hatteras, a United States naval vessel, she had received such injuries as to make extensive repairs necessary. This engagement took place only twenty-five miles from a home port, but instead of attempting to enter it, and make her repairs there, she sailed more than fifteen hundred miles to reach this port of Great Britain. In doing this she had sailed far enough, and spent time enough, to have enabled her to reach any of the ports of the insurgents; but the blockade prevented her entering them, and she was compelled to rely upon the hospitalities of neutral waters. At Jamaica, she was permitted without objection to make her repairs, and to take in such coal and other supplies as she required for her cruise. She was treated, Commodore Dunlop said, as any United States man-of-war would have been treated by him.

On the 25th of the same month (January, 1863) the Florida appeared at Nassau short of coal. Although she was only ten days from a home port, she was permitted to supply herself with coal and other necessaries. On the 24th of the next month she again appeared at Barbados, "bound for distant waters," but she was in distress, and unless permitted to repair the captain said he would be compelled to land his men and strip his ship. Notwithstanding her past offenses, permission to repair and take on supplies was granted.

These were the first visits of any of the offending cruisers to British waters. They were substantially their first visits to any ports of a neutral nation. The Florida stopped for a short time at Havana, on her way from Mobile to Nassau, and the Alabama was for a few hours at Martinique; but at neither of these places did they take on any coal or make any repairs.

Thus the nation, whose authority and dignity had been so grossly

offended in the construction and outfit of these vessels, was the first to grant them neutral hospitalities. From that time her ports were never closed to any insurgent vessel of war; and permission to coal, provision, and repair was never refused.

It is said in the British Counter Case, p. 118, that, during the course of the war, ten insurgent cruisers visited British ports. The total number of their visits was twenty-five, eleven of which were made for the purpose of effecting repairs. Coal was taken at sixteen of these visits. The total amount of coal taken was twenty-eight hundred tons.

The number of visits made by these cruisers to all the ports of all other neutral nations during the war did not exceed twenty. So it appears that the hospitalities extended by Great Britain in this form to the insurgents were greater than those of all the world beside; and yet more serious offenses had been committed against her than any other neutral nation.

They required repairs at about one-half their visits and coal at about two-thirds.

The average supply of coal to vessels of the insurgents was one hundred and seventy-five tons.

Because, therefore, the insurgents did make use of the ports of Great Britain as a base for their naval operations, and the British Government did not use due diligence to prevent, but on the contrary suffered and permitted it, all supplies of coal in those ports to Confederate ships were in violation of the neutrality of Great Britain, and rendered her responsible therefor to the United States.

All this constituted a violation of neutrality which entailed responsibilty.

M. R. WAITE.

VII.—ARGUMENT OF SIR ROUNDELL PALMER ON THE QUESTION OF THE RECRUITMENT OF MEN FOR THE SHENANDOAH AT MELBOURNE.

Her Britannic Majesty's Counsel, being permitted to offer some further observations in explanation of the facts as to the recruitment of men by the Shenandoah at Melbourne, as to which there appeared to the President to be some obscurity in the evidence, takes the liberty to submit the following statement:

Before the Tribunal can hold Great Britain responsible, by reason of this recruitment of men, for the subsequent captures of the Shenandoah, it must be satisfied (1) that the Government of Great Britain, by its Representatives in the Colony of Victoria, "permittted or suffered" the use of its ports or waters by the Shenandoah for this purpose, if not directly, at least by the want of due diligence to prevent such recruitment, and (2) that the recruitment so made was an augmentation of force necessary to enable the Shenandoah to effect the captures for which Great Britain is sought to be held responsible, and without which those captures could not have been made, and was in this way a direct and proximate cause of those captures.

It cannot be pretended, on the one hand, that Great Britain ought to be held responsible for a recruitment of men by a belligerent vessel which the local Government in no sense "permitted or suffered;" nor, on the other hand, that every act prohibited by the Second Rule of the Treaty of Washington can render the neutral Government responsible for all captures after such act, however remote, indirect, partial, or insignificant may have been the relation of that act, as a cause, to those captures as an effect.

The Shenandoah arrived at Melbourne on the 25th of January, 1865, and the next day she was visited by Captain King, Naval Agent on board of the Bombay, who found that her crew (it is presumed including officers and petty officers) then consisted of seventy men[1]. Of these seventy, about twenty-three appear to have soon afterward deserted, having previously served on board of some of the ships which the Shenandoah had taken on her cruise between October, 1864, and January, 1865. Her force was thus reduced to about forty-seven men, being the same, or nearly the same, number with which her cruise from the Desertas originally commenced; and less by twenty-three men than her force was when she arrived at Melbourne.[2]

On the day of his entrance into Port Philip, Captain Waddell, when asking permission to make the repairs and obtain the supply of coals necessary to enable him to get to sea as quickly as possible, and also to land his prisoners, gave a spontaneous promise to "observe" Her Majesty's "neutrality."[3]

Care was taken to ascertain, by a proper survey, what repairs were necessary; and, while allowing them to be made, the Governor (3d February, 1865) ordered a strict supervision, and daily reports, by the

[1] British App., vol. i, p. 499. [2] Ibid., pp. 523, 557, and 571.

[3] Lieutenant Waddell to Governor Darling, January 25, 1865. British App., vol. i, p. 500.

Customs authorities, directing every precaution in their power to be taken "against the possibility of the commander of that vessel in any degree extending its armament or rendering the present armament more effective." These orders were transmitted by the Head of the Customs Department to the Harbor Master, (February 6, 1865,) with a direction that "the proceedings on board the Shenandoah must be carefully observed, and any apparent abuse of the permission granted to that vessel with respect to repairs at once reported."[1] These orders were strictly acted upon.

On the 7th February leave to land "surplus stores" from the Shenandoah was refused, under the advice of the Attorney-General; and, on the same day, Captain Waddell was informed that "the use of appliances, the property of the Government, could not be granted nor any assistance rendered by it, directly or indirectly, toward effecting the repairs of the Shenandoah."[2]

So matters stood, the most scrupulous and anxious care being taken to prevent any breach of neutrality, till the 10th of February, when Consul Blanchard forwarded to the Governor an affidavit of one John Williams, a colored man, who had joined the crew of the Shenandoah from the captured ship D. Godfrey, in which he stated that on Monday, the 6th February, when he left the ship, "there were fifteen or twenty men concealed in different parts of the ship, who came on board since the Shenandoah arrived in Hobson's Bay, and who told him they came on board to join the ship; that he had cooked for these men; and that three others, who had also joined the Shenandoah in the port, were at the same time working on board in the uniform of the crew of the Shenandoah." On the 13th another affidavit of one Madden, who had also belonged to the crew of the D. Godfrey, was added, in which Madden said that, "when he left the vessel on the 7th February, there were men hid in the forecastle of the ship, and two working in the galley, all of whom came on board the vessel since she arrived in the port; and that the officers pretended they did not know that these men were so hid."[3]

The letter of the 10th February was the first intimation which the Governor ever received of any attempt at a recruitment of men. On the next day, the 11th February, Detective Kennedy was directed to make inquiries on that subject; and he, on the 13th February, reported "that twenty men have been discharged from the Shenandoah since her arrival at this port. That Captain Waddell intends to ship forty hands here, who are to be taken on board during the night and to sign articles when they are outside the Heads;" adding, "it is said that the captain wishes, if possible, to ship foreign seamen only, and all Englishmen shipped here are to assume a foreign name." He also mentioned certain persons said to be engaged in getting the requisite number of men; and he named one man, who stated, "about a fortnight ago," that Captain Waddell had offered him £17 to ship as carpenter, and another, as "either already enlisted or about to be so." But, as to the persons so named, no evidence was then, or at any time afterward before the departure of the ship, produced by any person in support of the information which had been so given to the detective officer.

To this Report Mr. Nicolson, the Superintendent of Detectives, made the following important addition on the same 13th February:

Mr. Scott, resident clerk, has been informed—in fact, he overheard a person represented as an assistant purser state—that about sixty men, engaged here, were to be

[1] British App., vol. i, p. 519. The same as to supplies. British App., vol. i. p. 517.
[2] British App., vol. v, pp. 76, 77.
[3] Ibid., vol. i, pp. 606, 608.

shipped on board an old vessel, believed to be the Eli Whitney, together with a quantity of ammunition, &c., about two or three days before the Shenandoah sails. The former vessel is to be cleared out for Portland or Warnambool, but is to wait outside the Heads for the Shenandoah, to whom her cargo and passengers are to be transported.[1]

This statement of Mr. Nicolson, while suggesting that the number of intended recruits might be even larger than that of which Detective Kennedy had received information, pointed to certain definite means, viz, transshipment from another vessel, (the Eli Whitney being named,) as those by which the recruitment was intended to be made.

The Governor in Council on the same day took these Reports, and also Consul Blanchard's letter of the 10th February, and Williams's affidavit, into consideration. The Law-Officers of the Colonial Government had already directed informations to issue, and warrants to be obtained, against such persons as Williams could identify as being on board the Shenandoah for the purpose of enlistment; and it was resolved that the movements of the Eli Whitney (then lying in the bay) should be carefully watched by the Customs Department. This watch was successful in preventing the accomplishment of the suspected design by means of that vessel, if it had, in fact, been entertained.[2]

A circumstance which occurred on the following day, the 14th of February, was calculated to confirm the impression that, if any such purpose really existed, its accomplishment was likely to be attempted by means of some auxiliary vessel lying outside the line of British jurisdiction. Captain Waddell on that day inquired by letter of the Attorney-General in what precise way the line of British jurisdiction at Port Philip was considered to be measured by the authorities. An answer to this inquiry, without explanation of the purpose with which it has been made, was most properly refused.[3]

A warrant having been issued for the apprehension of one of the men, said to be on board the Shenandoah and passing by the name of Charley, Mr. Lyttelton, Superintendent of Police, went on the 13th February on board the ship to execute it, but was met by the objection of the privileged character of the vessel as a public ship of war. Captain Waddell was then absent; but on the next day, the 14th, when Mr. Lyttelton returned, he repeated this objection, adding:

I pledge you *my word of honor, as an officer and a gentleman*, that I have not any one on board, *nor have I engaged any one, nor will I while I am here.*"[4]

The Governor then considered it right, since Captain Waddell refused to permit the execution of the warrant on board the ship, to suspend the permission which had been given for her repairs, and to take care that a sufficient force was in readiness to enforce that order of suspension. This was done, by a public notice, on the same day, (14th February, 1865.)[5] Captain Waddell thereupon remonstrated by letter of that date.[6]

The execution [he said] of the warrant was not refused, as no such person as the one specified was on board; but permission to *search* the ship was refused. * * * Our Shipping Articles have been shown to the Superintendent of Police. All strangers have been sent out of the ship, and *two commissioned officers were ordered to search if any such have been left on board. They have reported to me that, after making a thorough search, they can find no person on board except those who entered this port as part of the complement of men. I, therefore, as Commander of the ship, representing my Government in British waters, have to inform his Excellency that there are no persons on board this ship except those whose names are on my Shipping Articles, and that no one has been enlisted in the service of the Confederate States since my arrival in this port; nor have I, in any way, violated the neutrality of the port.*

[1] British App., vol. v, p. 523.
[2] Ibid., p. 521.
[3] British Appendix, vol. v, pp. 78, 79.
[4] Ibid., vol. i, p. 524.
[5] Ibid., p. 525.
[6] Ibid., p. 644.

On the next day, however, (the 15th,) certain men who had been on board, as described in Williams's and Madden's affidavits, left the Shenandoah, four of whom, being observed, were captured on landing; and among these was Charley, for whose apprehension the warrant had been issued. An officer of the Shenandoah was seen at the gangway of the ship, apparently directing the boatmen who took those four men on shore; and the men themselves stated to the Superintendent of Police "*that they had been on board a few days unknown to the Captain; and that, as soon as he found they were on board, he ordered them on shore.*"[1] Captain Waddell, when informed by the head of the Customs Department (15th February, 1865) of the arrest of these men, and reminded by him that they were thus proved to have been on board on the two previous days, when their presence was denied by the officer in charge, and by himself, "necessarily without having ascertained by a search that such men were not on board," answered thus:

The four men alluded to in your communication are no part of this vessel's complement of men; *they were detected by the ship's police, after all strangers were reported out of the vessel, and they were ordered and seen out of the vessel by the ship's police immediately on their discovery,* which was after my letter had been dispatched informing his Excellency the Governor that there were no such persons on board. *These men were here without my knowledge, and I have no doubt can properly be called stowaways; and such they would have remained, but for the vigilance of the ship's police, inasmuch as they were detected after the third search;* but in no way can I be accused, in truth, of being cognizant of an evasion of the Foreign-Enlistment Act.[2]

In the depositions of Williams and Madden, taken before the magistrate on the 16th February, it was stated that certain of the subordinate officers of the ship (not Captain Waddell) were cognizant of the presence of Charley in the forecastle of the ship; but these statements were not confirmed by the other witnesses; and no similar evidence was given as to the rest of the prisoners.[3] The particular officers of the Shenandoah, as to whom these statements were made by Williams and Madden, published on the same day in the Argus, a Melbourne newspaper, declarations, signed with their names, most positively denying all the statements affecting them; and one of them, Acting-Master Bullock, said that he had been often asked by persons on board if they could be shipped; and had invariably answered: "*We can ship no man in this port, not even a Southern citizen.*"[4]

This was the position of matters when the 17th of February arrived: the reports of the detective officers had preceded, not followed, the investigations with respect to the men alleged to be actually on board for the purpose of enlistment, and the solemn and repeated declarations and promise of Captain Waddell, on the word of a gentleman and an officer, confirmed by the declarations of the other officers of the ship. The Eli Whitney had been strictly watched. No further definite information had reached the Government, who believed that all the men who had been secreted on board the Shenandoah had actually left the vessel.[5] Mr. McCulloch, the Chief Secretary of the Government, and Mr. Harvey, the Minister of Public Works, expressly so stated in the Debates of the Legislative Council of the 15th and 16th February, the

[1] British App., vol. v, pp. 527, 542, 545, 572. [2] Ibid., pp. 645, 646. [3] Ibid., pp. 537, 545.

[4] British Appendix, vol. i, pp. 547–548. It appears from the depositions that there were at this time (and, indeed, until the vessel left the port) many men working on board; and it may be collected also from the depositions that the four prisoners came or remained on board of their own accord, being desirous of going to sea in her; although the fact that they were there may subsequently have come to the knowledge of some of the officers.

[5] See, also, Lord Canterbury's dispatch of November 6, 1871; British Appendix, vol. v, p. 61.

latter minister saying, (15th February :)[1] "It was now known that several men who shipped in Hobson's Bay had escaped, in addition to the four who were captured." And although, on the 17th February, Consul Blanchard again requested attention to the statement contained in the affidavits originally sent, (and in certain other affidavits of persons who were also produced as witnesses against the four prisoners,) that there had been, at the dates when those witnesses left the vessel, ten or more persons on board under similar circumstances, (the witnesses speaking with wide variations as to the number;)[2] this was not inconsistent with the belief of the Government that all such persons had afterward left the ship, especially as, in the depositions of the same witnesses before the magistrate, (except that of Williams in one case, on cross-examination,) no mention whatever was made of any such other persons; which was also the case on the subsequent trial, in March following.[3] It is further to be remembered that on the 17th February the prosecutions against these four men (who were not tried till the 17th March) were actually pending.

As matters then stood, however unsatisfactory some of the circumstances might have been, it would be very difficult for any candid mind to draw a sound distinction between the position of Captain Waddell with respect to the men alleged by him to be "stowaways," and that of Captain Winslow, of the United States ship Kearsarge, with respect to the sixteen or seventeen men taken in that ship from Queenstown to the coast of France.[4] If Captain Winslow, as a man of honor, was properly exonerated, upon his own solemn assurance, from responsibility for that act, in which some of his subordinates must have, to some extent, participated, and as to which his own conduct on the French coast, before he sent the men back, was certainly not free from indiscretion, can it be imputed as a want of due diligence to the Government of Melbourne (whose good faith and vigilance had otherwise been so manifestly proved) that, although not entirely satisfied with Captain Waddell's demeanor or conduct, they accepted the solemn assurances of not one, but several officers, of the same race and blood, and with the same claims to the character of gentlemen as the officers of the United States?

In the memorandum sent home by Lord Canterbury on the 6th of November, 1871, signed by the gentlemen who were the Chief Secretary, Commissioner of Customs, Minister of Justice, and Attorney-General of the Colony when the Shenandoah was at Melbourne, it is thus stated:

> While the Shenandoah was in port there were many vague rumors in circulation that it was the intention of a number of men to sail in her; but *although the police authorities made every exertion to ascertain the truth of these rumors*, yet (with the exception of the four men alluded to) nothing sufficiently definite to justify criminal proceedings could be ascertained; indeed, at the best, those rumors justified nothing more than suspicion, and *called only for that watchfulness which the Government exercised to the fullest extent in its power*. It was not until after the Shenandoah had left the waters of Victoria that the Government received information confirming in a manner the truth of these rumors.[5]

In the report from the office of the Chief Commissioner of Police, dated October 26, 1871, it is also stated that "on the 16th February representations were again made to the Government that the Foreign Enlistment Act was being violated; *and the police were instructed to use their utmost efforts to prevent this*; but, as no visitors were allowed on

[1] British Appendix, vol. i, pp. 633, 636.
[2] Ibid., pp. 606, 611, 615.
[3] Ibid., pp. 537, 545, 563, 571.
[4] See United States Appendix, vol. ii, pp. 419–454; particularly pp. 429, 430, 434, and 448.
[5] British App., vol. v, p. 62.

board the Shenandoah, under any pretense, for three days before she sailed, and in the absence of any of Her Majesty's ships in our waters at the time, the efforts of the water-police were necessarily of little avail."[1]

Late in the afternoon (about 6 p. m.) of the 17th February, the United States Consul received information from one Forbes, which was afterward, on the same evening, reduced into the shape of an affidavit, and intrusted to a Mr. Lord, with a view to being placed in the hands of the water-police, too late, however, (in Mr. Lord's judgment,) to be so acted upon. From the haste with which the Consul was obliged to act in this matter, and the inability of the Crown Solicitor to take the affidavit, some misunderstanding arose, which, however, ceases to be in any way material, when the substance of the information is regarded. What was that information? That five persons, named by Forbes, standing on the railway pier at Sandridge, at 4 o'clock p. m., on the 17th of February, admitted to him (by the statement of one of them, made in the presence of the rest) that they were "*going on board the Maria Ross, then lying in the bay ready for sea;*" and that, "*when the Shenandoah got outside the Heads, the boats from the Maria Ross were to come to take them on board at 5 o'clock;*" adding, "*that there were many more, besides his party, going the same way.*"[2]

This statement, so far as it may be considered to have reached any officer of the Government in time for action, directed their attention positively and exclusively to the Maria Ross as the medium intended to be used for the apprehended recruitment. The Government did their duty vigilantly with respect to this ship, the Maria Ross. She was twice searched; once by the crew of the Customs boat and once again at the Heads; and it was proved to the satisfaction of Detective Kennedy (nor is there any reason now to doubt the fact) that, when she sailed on the morning of the 18th February, there were no men on board her, except her crew.[3]

The information which had thus been given as to the supposed intention to transfer men to the Shenandoah from the Maria Ross may perhaps supply an intelligent reason for the fact that, on the night of the 17th, the police-boat, instead of remaining off shore, pulled in the direction of that part of the bay in or near which the Shenandoah was lying.[4]

Of the shipment of men, which did undoubtedly take place on the night of the 17th February just before the Shenandoah left, whatever may have been its real amount, and of the means by which it was accomplished, the Government of Victoria had neither knowledge nor means of information. The best evidence of the facts relating to it is that which was collected shortly after the Shenandoah had sailed by the Government of Melbourne itself, and which was published at the time, without the least disguise, by Her Majesty's Government. The substance of that evidence shall here be concisely stated; and some remarks must afterward be made on the affidavit of Temple, sworn at Liverpool in December, 1865, and on that of Ebenezer Nye, sworn in the United States on the 22d September, 1871.

The Melbourne newspapers of the 20th February, 1865, spoke of certain rumors (which were believed to be partially true, though exaggerated as to number) that the Shenandoah had taken away with her "about eighty men." These reports were at once ordered to be investigated by the police. It appeared that seven men of Williamstown,

[1] British App., vol. v, p. 121.
[2] Ibid., vol. i, p. 555.
[3] Ibid., vol. v, pp. 120, 121.
[4] Ibid., vol. i, p. 551.

who had been employed in coaling the Shenandoah, went on board her on the morning of the 18th, just as she sailed, under pretense of getting paid for their work, and did not return. So far, inquiry seems to have been made as to the occasion for their going. They went by daylight, and the occasion alleged was credible and lawful. Other men were taken off in boats between 9 o'clock p. m. and midnight on the 17th, from the Sandridge Railway Pier; their numbers were variously reported. According to the information obtained by Detective Kennedy, chiefly from Robbins, there were five boats employed; according to that of Superintendent Lyttelton, about 40 men were in the *scrub* near the pier, and three other boats went off with *eighteen* men. There was (according to the boatmen) an officer of the Shenandoah standing on the pier. Constable Minto, who was on duty at the pier at 9 p. m. on that evening, "observed three watermen's boats leave the pier and pull toward the Shenandoah, each boat containing about six passengers," and saw a person in plain clothes, whom he believed to be an officer of that ship, superintending the embarkation. He was succeeded on duty by another constable, named Knox, who, on Minto's return at midnight, told him that, "during the absence of the police-boat, (which had pulled off, as already stated, into the bay,) three or four boats had left the pier for the Shenandoah, containing in all about twenty passengers."[1] Besides these, it appears that one officer (Blacker) joined the Shenandoah, from a ship called the Saxonia, under circumstances of which the Colonial Government could have had no notice whatever.

It is impossible to rely on the accuracy, as to numbers, of these estimates, which, if taken at their maximum, would appear to give about thirty-eight or forty men, exclusive of the seven others from Williamstown, who went on the morning of the 18th February. But of these, again, it would be very hazardous to assume that all were recruits, whether British subjects or foreigners. Some (a very few only were identified by name) were undoubtedly both recruits and British subjects; and whether the number of them was greater or less, the offense of Captain Waddell was very justly regarded by Governor Darling as a serious one against Her Majesty's neutrality. But it is consistent with all probability and experience that some of the proper crew of the Shenandoah may have remained on shore (as sailors constantly do) to the last moment, and may have returned with or without baggage. Justice would hardly be done to the policemen, Minto and Knox, if this habit of sailors, and also the fact that they are often accompanied by their friends to the ship, when nothing wrong is intended, were not borne in mind. Those two policemen appear to have told their story without any sign of consciousness that the circumstances had made it their duty to interfere with the boats and persons in question. If, in this respect, they should be deemed to have misconceived or to have failed in their duty, it is surely out of the question to hold Great Britain responsible on that account.

It now becomes necessary to advert to the part taken by George Washington Robbins (whose affidavit, sworn on the 21st of September, 1871, is made part of their evidence by the United States) as to this transaction. Robbins was a stevedore at Melbourne; he gave information, at the time of the inquiry there, as to these events, to the Melbourne police and others. He stated to Detective Kennedy[2] that between 10 and 11 o'clock at night, on the 17th of February, he was him-

[1] British App., vol. i, pp. 550–553. [2] Ibid., p. 550.

self in a boat alongside the Shenandoah, and saw Riley's boat, (with twelve men,) and four other boats, put men on board that vessel. He also stated to Superintendent Lyttleton[1] that "he passed across the bay on that night, with a message from the American Consul to the police, to the effect that the Shenandoah was shipping men on board; and, on his way, saw a boat pulled by Jack Riley and a man named Muir; they had about twelve men in the boat. On his return, Riley and Muir, being alone, pulled off from the Shenandoah."

Consul Blanchard (to Mr. Seward, February 23) says:[2]

During the night several persons endeavored to find me, to give information of the shipment of men for said vessel. *One Robbins, a master stevedore, found me at* 11 *o'clock p. m.*, and informed me that boat-loads of men with their luggage were leaving the wharf at Sandridge, and going directly on board said vessel; and that the ordinary police-boats were not to be seen in the bay. I informed said Robbins that Mr. Sturt, police magistrate, told me the water-police were the proper persons to lodge any information with; and that he, as a good subject, was bound to inform them of any violation of law that came under his notice, which he promised to do. * * * On the 18th of February the aforesaid Mr. Robbins called at the Consulate, and informed me that six boat-loads of men left the wharf with their luggage during the previous night, and that they were taken on board said vessel through the propeller's hoist-hole. When asked to give his affidavit, he said, as the officials would take no notice he would only injure his business by so doing, and he declined. He stated that about seventy men went on board said vessel on the night of the 17th February, and *that some of them took and used his boat to go in.* Captain Sears, of the American bark Mustang, was on the wharf watching; who informs me that he saw several boat-loads of men with luggage go to said vessel while lying in the bay; and that he also saw Robbins go to the police.

It is manifest, from all the foregoing evidence, that Robbins did not go to the police till after midnight on the 17th February, when all the men in question had already been shipped. And, if the nature of what was being done was at the time clearly manifest, it might have been expected that some interference by the police would have been previously invited by the American Captain Sears, who witnessed the departure of so many boats full of men. Robbins, in his affidavit of the 21st September, 1871, does not undertake to say more as to the number of men who were shipped than this: "I know that several men, residents of this port, went on board the Shenandoah in this port, as addition to her crew, and went away in her," naming two individuals who did so. He also there says, "I reported to the water-police at Williamstown" (*i. e.*, on the opposite side of the bay, where their station was) "the shipping of the men, but they said they were powerless to interfere without directions from the head authorities in Melbourne."[3] At that time the recruitment of the night in question had been fully accomplished.

It is submitted, that nothing can more plainly establish the good faith and zeal, in this whole matter, of the Government of Victoria, than the resentment which they immediately manifested at the breach of Captain Waddell's honorable engagement and at the violation of Her Majesty's neutrality which had thus taken place. A resolution was at once passed to refuse all further hospitalities to the Shenandoah in the event of her return; and information was promptly given (February 27, 1865) to the Governors of all the neighboring British Colonies that they might adopt a similar course.[4]

With respect to Temple's affidavit, its only bearing is upon the question what number of men were shipped by the Shenandoah at Melbourne, and whether those were, or were not, British subjects. Apart

[1] British App., vol. i, p. 553.
[2] Ibid., p. 587.
[3] Appendix to United States Counter Case, p. 1185.
[4] British Appendix, vol. i, p. 565.

from any extrinsic confirmation which it may be considered to receive from more trustworthy quarters, no reliance can be placed upon the truth of any word spoken by this man. He is proved[1] to have offered, in the case of Captain Corbett, to give evidence then admitted by himself to be willfully false; and in this very affidavit he states several flagrant falsehoods, which he must have well known to be such, as to entertainments alleged by him to have been given on board the Shenandoah, not only to other officers of the Colonial Government, but to the Governor of Victoria, Sir Charles Darling, himself; and also as to assistance in like manner alleged by him to have been given to Captain Waddell, in the repairs of the ship, by the Government Surveyor at Melbourne.[2]

What Temple says is, that when the Shenandoah left Port Philip she had on board "some fifty or sixty persons as stowaways, all British subjects." His means of knowledge as to who were, and who were not, really British subjects, do not appear, and cannot be assumed. In the list appended to his affidavit, the composition of the crew, when the ship arrived at Liverpool in the autumn of 1865, purports to be stated. By that list it is made to appear that she then had twenty-four officers, and thirty petty officers and men, who were on board her at the time of her arrival at Melbourne; one officer (Blacker, in place of another who had left her there) and forty-three petty officers and men, (thirty-seven said to be British, and six American,) who joined her at Melbourne; and thirty-eight men, obtained from the crews of vessels captured subsequently to her departure from Melbourne. "Some fifty or sixty" thus became, even on his own showing, reduced to forty-four.

It is submitted that nothing is added to the credit or weight of Temple's evidence, on these points, by the remarks made upon it in Governor Darling's dispatch to Mr. Cardwell of the 21st March, 1866:[3]

> Having expressed to you in my dispatches, to which you refer, my belief that Captain Waddell had, notwithstanding his honorable protestations, flagrantly violated the neutrality he was bound to observe, in the shipment of British citizens to serve on board his vessel, I have read without surprise, but with deep regret, the long list of names furnished by Mr. Temple, *which completely proves that this belief was justly founded.*

The Governor, without going into any exact computation, was content to take the statement of a man whom in other respects he proved in the same letter to have sworn to deliberate untruths, as sufficient to confirm his own general belief, previously formed and expressed. If Temple is not a trustworthy witness as to details, this cannot make him so; the original grounds of the Governor's own belief remain, as they were before, a far better source of information.

With respect to the affidavit of Ebenezer Nye, of the Abigail, (United States Appendix, vol. vii, p. 93,) he says nothing of his own knowledge, but simply reports information said to have been given to him, after May, 1865, on board the Shenandoah, by Mr. Hunt, the master's mate of that ship. Even if there were nothing else by which to test the value of such miscalled evidence, it would plainly be of no value. Hunt is here represented as saying that "forty-two men joined the Shenandoah at Melbourne; that some of them came on board when she first arrived; that the United States Consul protested against their joining, and the Governor finally attempted to stop them, and to search the ship; but that Captain Waddell would not allow the ship to be searched, though a number of recruits were then on board; that the Governor was then about to seize the vessel, but that Captain Waddell by his

[1] British App., vol. i, pp. 710, 711, and 723.
[2] Ibid., pp. 696, 721, and 722.
[3] Ibid., p. 722.

firmness, and threats to leave the ship upon the Governor's hands, and to return and report the matter to his Government, obtained her release."

The Tribunal knows, from the contemporaneous documents, what were the real facts, of which this is a garbled and inaccurate version. This same Mr. Hunt also wrote a pamphlet called "The Cruise of the Shenandoah," some extracts from which the United States have made part of their evidence.[1] In this narrative,[2] after speaking of the progress of the repairs of the Shenandoah at Melbourne, a story, in some respects similar, is told, but with the omission of all the particulars material to the present inquiry. Not one word is there said about recruits; on the contrary, there is an implied denial that, when the temporary suspension of the repairs took place, any recruitment had been attempted or was intended. "The work," he there says, "was nearly completed when an order came from the governor to seize the ship, a rumor having been widely circulated and believed that he had a number of men on board, intending to take them to sea and enlist them *in violation of the well-established rules of International Law.*" Either Mr. Ebenezer Nye's memory after six years confounded things elsewhere read with Mr. Hunt's representations, or those representations must have had in them, as his "Cruise" itself has, a large element of "romance." Whatever view may be adopted, Mr. Nye's affidavit really adds nothing to the original evidence, from which alone the truth on this subject can be ascertained.

Let it, however, be supposed that the statements of Temple, and of Hunt, according to Nye, might be accepted as accurate; that, in all, forty-two or even forty-four men were taken on board the Shenandoah at or from Melbourne. The Shenandoah had lost, at Melbourne, one officer and twenty-three men out of those who constituted her crew when she arrived there, (being the men, or the greater number of them, who had previously joined her from captured vessels.) By this assumed addition her number of officers when she left was the same, and her complement of men was greater by about twenty only than when she arrived in the colony. If such an addition (supposing it were deemed, contrary to the effect of the whole evidence, to have been improperly "suffered" by the Colonial Government) were deemed a sufficient ground for holding Great Britain responsible to the United States for all her subsequent captures, it seems impossible to escape from the conclusion that if the Kearsarge had gone to sea, and made captures with the sixteen or seventeen men on board whom she shipped from Queenstown, the Confederates (had they been successful in the war) might have held Great Britain responsible for all the subsequent captures of the Kearsarge; nay, further, that France is at this moment *à fortiori* responsible to the United States for all the captures made by the Florida after she had been permitted to renovate her crew in that country.

On what ground is it to be assumed that the addition of this number of men was a direct or proximate cause of all or any of those captures so as to make Great Britain responsible for them?

True it is, that when the Shenandoah came into Port Philip, on the 25th of January, with seventy hands on board, Captain King reported that "from the paucity of her crew at present she could not be very efficient for fighting purposes."[3] But she never was meant, and she never was used, for fighting purposes. Her first cruise, after leaving

[1] United States Appendix, vol. vi, pp. 694–698.
[2] Ibid., p. 696.
[3] British Appendix, vol. i, p. 499.

Desertas, began with a complement of officers and men certainly not larger than that which remained in her at Melbourne, after all the desertions which took place there, and before any new enlistments. Yet, with that limited number, she began a series of captures; and, as she made these captures, she increased her crew successively from the vessels taken—the Alina, the D. Godfrey, the L. Stacey, the Edward, and the Susan. If she had left Melbourne without any recruitment whatever, she would have been in quite as good a condition for her subsequent cruise as she was for her original cruise, when she left Desertas. The whaling vessels, which she met with afterward, could no more have offered resistance to her than the merchant and whaling ships which she had met before.

On the day of her leaving Port Philip, (18th February,) Consul Blanchard, who had then received all the information which Robbins and others could give him as to the number of men taken on board during the preceding night, wrote thus to Mr. McPherson, the American Vice-Consul at Hobart Town: "My opinion is that she intends coming there, with a view to complete her equipment, she having much yet to do to make her formidable. She cannot fight the guns she has on board."[1] In point of fact, her subsequent cruise was conducted exactly as her previous cruise had been, and, on Temple's showing, she added to her crew, during the interval between her leaving Melbourne and her arrival at Liverpool, thirty-eight more men, taken from subsequently-captured vessels—the Hector, Pearl, General Williams, Abigail, Gypsey, W. C. Nye, and Favorite. It is, therefore, perfectly apparent from the whole history of the ship and of both her cruises, that she was not dependent for her power to make captures upon any addition to the strength of her crew which she received at Melbourne, and that her proceedings would, in all probability, have been exactly the same if she had never received that addition. Can the Tribunal possibly decide that, for the whole losses caused to American citizens by those subsequent proceedings, the nation, in one of whose colonies this recruitment of men (not shown to be a proximate cause of any loss whatever) took place, is to be held responsible?

Finally, it is right that, on the part of Great Britain, but in the interest not of Great Britain alone, but of civilized States in general, the attention of the Tribunal should be seriously directed to the general importance of the question on which it is now about to determine.

The facts, to which the discussion relates, occurred seven years ago in a remote colony distant several thousand leagues from Great Britain. The Governor, who then administered the affairs of the Colony, has long been dead. To hold personal communication with the officials, to obtain from them renewed explanations and interrogate them on points of detail, has been impossible. To expect that the British Government should be able to state with exactness every measure of precaution then adopted, and every order or instruction orally given by the police authorities of the Colony to their subordinates, and to account for and explain every circumstance as to which a doubt may be suggested, would be unreasonable in the highest degree. Nevertheless, the Government of Her Majesty has, with an openness, fullness, and precision which it believes to be entirely without example in the history of international controversies, placed before the eyes of the Arbitrators every fact, every direction given to its officers, every act of the Governor of the Colony and his Council, which could be gathered from the records

[1] British Appendix, vol i, p. 617.

of the Colony or of the Home Government, or could be ascertained by a strict and careful inquiry. This narrative shows that, whatever might have been the feelings and sympathies of the people of the Colony, (feelings which, in a free community, no Government attempts to control,) there was, from first to last, on the part of the Colonial Government, a sincere and anxious desire to adhere strictly to the line of neutral duty. It is a narrative of renewed and continued precautions, renewed and continued from day to day during the whole time that the cruiser remained in the waters of the Colony. No reasonable person can doubt that any increase of the Shenandoah's armament, any augmentation of her crew, was a thing which the Colonial Government was really desirous of preventing by all means within its power. No reasonable person can fail to see that prevention, in the latter case, was embarrassed by difficulties, which could only be fully understood by persons actually on the spot, and for which, in judging of the conduct of the local authorities, fair allowance ought to be made. On the night before the Shenandoah left Melbourne, a number of men, taking advantage of those difficulties, contrived to elude the vigilance of the authorities and to get on board the ship, some under cover of the darkness, others under a plausible pretext, which could not be known to be untrue.

Whether, on these facts, Great Britain is to be charged with a failure of international duty, rendering her liable for all captures subsequently made by the Shenandoah, is the question now before the Tribunal; and it is the duty of the Arbitrators to weigh deliberately the responsibility they would undertake by deciding this question in the affirmative.

They will not fail to observe that the principle of such a decision is wholly independent of the three Rules. It is a decision on the nature of the proof, on the character of the facts, upon which a belligerent nation is entitled to found a claim against a neutral, and that claim a demand for indemnity against losses sustained in war in which the neutral has no part or concern. It is not confined to maritime wars. It extends, and may be applied, at the will of the belligerent, to any act which a neutral Government is under any recognized obligation to endeavor to prevent. Is it necessary to point out that such a decision will certainly prove a fertile precedent?

Throughout the whole of this controversy Great Britain has steadily maintained one thing—that, before a heavy indemnity is exacted from a neutral nation for an alleged violation of neutrality, the facts charged should, at any rate, be proved. This is demanded alike by the plainest considerations of expediency and by the most elementary principles of justice. If this Tribunal decides that, in a case of doubt or obscurity—a case, in other words, in which the proof is imperfect, the fact of negligence not clearly made out, and in which recourse must be had to vague presumptions and conjectures—the culpability and burden are to be thrown upon the neutral nation, it will have established a grave and most dangerous precedent—a precedent of which, in the future, powerful States, under circumstances of irritation, will certainly not be slow to take advantage.

ROUNDELL PALMER.

[Translation.]

VIII.—OBSERVATIONS ADDRESSED TO THE TRIBUNAL BY MR. CUSHING, IN THE NAME OF THE COUNSEL OF THE UNITED STATES, ON THE 21ST AUGUST, 1872, AND MEMORANDUM AS TO THE ENLISTMENTS FOR THE SHENANDOAH AT MELBOURNE.

MR. PRESIDENT AND GENTLEMEN OF THE TRIBUNAL: The present discussion has its origin in the doubts expressed at the last meeting on the subject of the *number* of men enlisted for the Shenandoah at Melbourne. Previously to the expression of those doubts, all the members of the Tribunal in succession had announced their opinion on the points involved in the general question of the responsibility of Great Britain with regard to the prizes made by the Shenandoah after her departure from Melbourne.

We have prepared a Memorandum, which proves conclusively the correctness of the statements of Temple, the perfect agreement between his statements and those of Nye, who, in support of these same statements, produces the evidence of Hunt, an officer of the Shenandoah. This Memorandum also adduces the declarations of other witnesses, which confirm the evidence of Temple, Nye, and Hunt. In fact, it is beyond doubt,—

1. That the Shenandoah enlisted at least forty-three men at Melbourne. This number is indeed now admitted by Sir Roundell Palmer.

2. That the Shenandoah discharged at Melbourne only seven men of her crew, although thirteen others left her; but that these thirteen were prisoners of war, who did not form part of the crew, and there is reason to believe that the six or seven others who, it is asserted, were discharged at Melbourne, were also prisoners of war.

It follows that the strength of the crew of the Shenandoah was increased by forty-three men.

OBSERVATIONS ADRESSÉES AU TRIBUNAL PAR M. CUSHING, AU NOM DU CONSEIL DES ÉTATS-UNIS, LE 21 AOÛT 1872, ET MÉMORANDUM SUR LES ENRÔLEMENTS POUR LE SHENANDOAH À MELBOURNE.

MONSIEUR LE PRÉSIDENT, MESSIEURS DU TRIBUNAL: La discussion actuelle a son origine dans les doutes exprimés lors de la dernière séance au sujet du *chiffre* des enrôlements que le Shenandoah a faits à Melbourne. Avant d'émettre ces doutes, tous les membres du tribunal, l'un après l'autre, avaient annoncé leur opinion à l'égard des points compris dans la question générale de la responsabilité de la Grande-Bretagne au sujet des prises faites par le Shenandoah après son départ de Melbourne.

Nous avons préparé un mémoire qui démontre, jusqu'à l'évidence, l'exactitude des déclarations de Temple, le parfait accord entre ses déclarations et celles de Nye, et qui, à l'appui de ces mêmes déclarations, produit le témoignage de Hunt, officier du Shenandoah. Ce mémoire fait valoir aussi les déclarations d'autres témoins, qui confirment le témoignage de Temple, de Nye et de Hunt. En effet il est hors de doute:

1. Que le Shenandoah a enrôlé au moins 43 hommes à Melbourne. Ce chiffre est admis aujourd'hui, même par Sir Roundell Palmer.

2. Que le Shenandoah n'a licencié à Melbourne que 7 hommes de son équipage, quoique 13 autres l'aient quitté; mais que ces 13 étaient des prisonniers de guerre, qui ne faisaient point partie de l'équipage, et il y a lieu de croire que les 6 ou 7 autres, que l'on prétend avoir licenciés à Melbourne, étaient aussi des prisonniers de guerre.

Il s'ensuit qu'il y eut une augmentation de 43 hommes dans l'effectif de l'équipage du Shenandoah.

3. That the word "*seamen*" employed by Nye means "sailors," in addition to whom there were on board the Shenandoah, according to Nye's own account, sixty or fifty-five other persons, officers, firemen, &c., in conformity with the narrative of Temple and Hunt.

4. That without the re-enforcement of her crew effected by means of these enlistments at Melbourne, the Shenandoah could neither have continued her cruise, nor consequently have captured the American whalers in the North Pacific.

5. That all this constituted a flagrant violation of international law, and even of British municipal law, in the opinion of the Governor, Sir Charles Darling, himself.

6. That finally, and above all, it constituted a manifest violation, on the part of the British authorities, of the second Rule of the Treaty, which runs thus:

A neutral Government is bound not to permit or suffer either belligerent to make use of its ports or waters as the base of naval operations against the other, or for the purpose of the renewal or augmentation of military supplies or arms, or the recruitment of men.

The Counsel of Great Britain has just addressed to the Tribunal observations, not merely with regard to the *number* of men enlisted at Melbourne, but also on the subject of the legal bearing of the question of these enlistments as a thesis of the law of nations, or of that laid down by the Treaty.

We frankly confess that we did not contemplate so wide a discussion. We therefore respectfully beg the Tribunal to inform us if the new questions raised by Sir Roundell Palmer remain open before the Tribunal.

C. CUSHING.

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3. Que le mot "*seamen*," employé par Nye, veut dire "*matelots;*" en dehors desquels il y avait à bord du Shenandoah, d'après le récit de Nye lui-même, 60 ou 55 autres personnes, officiers, chauffeurs, *et cetera*, conformément au récit de Temple et de Hunt.

4. Que, sans le renfort apporté à son équipage au moyen de ces enrôlements à Melbourne, le Shenandoah n'aurait pu ni continuer sa croisière ni, par conséquent, capturer les baleiniers américains dans le haut Pacifique.

5. Que, dans tout ceci, il y a eu une violation flagrante du droit des gens, et même de la loi municipale britannique, de l'avis même du gouverneur sir Charles Darling.

6. Qu'enfin, et surtout, il y a ici une violation manifeste, de la part des autorités de la Grande-Bretagne, de la seconde règle du traité, règle ainsi conçue:

"Un gouvernement neutre ne doit ni permettre ni tolérer que l'un des belligérants se serve de ses ports ou de ses eaux comme d'une base d'opération navale contre un autre belligérant; il ne doit ni permettre, ni tolérer non plus, que l'un des belligérants renouvelle ou augmente ses approvisionnements militaires, qu'il se procure des armes ou bien encore qu'il recrute des hommes."

Maintenant le conseil de la Grande-Bretagne vient d'adresser au tribunal des observations, non-seulement à l'égard du *chiffre* des enrôlements à Melbourne, mais aussi au sujet des relations juridiques de la question de ces enrôlements, comme thèse du droit des gens ou du traité.

Nous avouons franchement qu'une discussion aussi étendue n'entrait pas dans nos prévisions. Dès lors, nous prions le tribunal très-humblement de nous faire savoir si les questions nouvelles soulevées par sir Roundell Palmer restent ouvertes devant le tribunal.

C. CUSHING.

RECRUITMENT OF MEN FOR THE SHENANDOAH AT MEL BOURNE.

Mr. Grattan, British Consul at Teneriffe, gives the earliest account of the number of the men who were on board the Shenandoah when she parted from the Laurel. He says that the Laurel brought "seventeen seamen and twenty-four supposed officers," and that "some of the crew of the Laurel joined the Sea King." (British Appendix, vol. i, p. 477.) He makes no mention of any of the crew of the Sea King remaining on her; but the depositions of two persons transmitted by him in his dispatch (Ellison, p. 455, and Allen, p. 479, Brit. App., vol. i) show that one officer came out from London on the Sea King, and that three of the crew of the Sea King remained on her.

William A. Temple, a sailor on board, gives the next account, in a deposition sworn to in Liverpool on the 6th day of December, 1865. He gives the names of two officers who came out in the Sea King from London, of twenty-two officers who joined her from the Laurel, of ten petty officers who joined her from the same vessel, of four seamen and two firemen who joined her from the same vessel, and of one seaman and two firemen who came out in her from London. It appears by the affidavit of George Sylvester (Am. App., vol. vi, p. 608) that he also came out in the Laurel as a common sailor, and left the Shenandoah at Melbourne. His name, therefore, should be added to Temple's list. Assuming, what is undoubtedly the fact, that Mr. Gratton, under the term "crew," embraced petty officers, seamen, and firemen, there is no discrepancy between these statements. Mr. Gratton gives twenty-four officers to the Shenandoah; Temple gives twenty-four also, twenty-two of whom are from the Laurel. Mr. Gratton says that out of seventeen seamen by the Laurel "some did not join the Shenandoah." Temple, adding Sylvester's name to his list, gives the names of sixteen petty officers, seamen, and firemen who did join from the Laurel, and also of three seamen and firemen who joined from the Sea King. So far as the

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MÉMORANDUM

Sur les enrôlements pour le Shenandoah à Melbourne.

M. Grattan, consul britannique à Ténériffe rend compte le premier du nombre des hommes qui se trouvaient à bord du Shenandoah lorsque ce vaisseau quitta le Laurel. Il dit que le Laurel amena "dix-sept matelots et vingt-quatre officiers supposés;" et "que quelques hommes de l'équipage du Laurel montèrent sur le Sea King." (Brit. App., vol. 4, §. 477.)

Il ne dit pas s'il resta des hommes faisant partie de l'équipage du Sea King à bord de ce vaisseau; mais les dépositions de deux personnes transmises par lui dans sa depêche (Ellison, p. 478; Allen, p. 479; Brit. App., vol. 1) montrent qu'un officier arriva de Londres sur le Sea King et que trois hommes de l'équipage restèrent à bord de ce vaisseau.

William A. Temple, matelot à bord du vaisseau, dans une déposition faite sous serment à Liverpool, le 6 décembre 1865, donne les noms de deux officiers qui arrivèrent de Londres sur le Sea King, de vingt-deux officiers qui passèrent du Sea King à bord du Shenandoah, de quatre matelots et de deux pompiers-mécaniciens qui firent de même, et d'un matelot et deux pompiers-mécaniciens qui arrivèrent de Londres à bord du même vaisseau. Il paraît par l'*affidavit* de George Silvester (Am. App., vol. 6, p. 608) que ce dernier arriva aussi sur le Laurel comme matelot et qu'il quitta le Shenandoah à Melbourne; ce serait donc encore un nom à ajouter à la liste de Temple.

En supposante ce qui est évidemment le fait, que M. Grattan, sous le terme équipage, a compris les officiers subalternes, les matelots et les mécaniciens-pompiers, il n'existe aucune contradiction entre ces déclarations. M. Grattan donne vingt-quatre officiers au Shenandoah, Temple lui en donne vingt-quatre aussi, dont vingt-deux sont du Shenandoah. M. Grattan dit que des dix-sept matelots du Laurel, il y en eut qui n'entrèrent pas dans l'équipage du Shenandoah; Temple, en ajoutant à sa liste le nom de Sylvester, donne les noms de seize officiers subalternes, matelots et mécaniciens-pompiers, qui quittèrent le Laurel pour s'embarquer sur le Shenandoah et aussi de trois matelots et

Sea King is concerned this account is confirmed by Sylvester's affidavit. (Vol vi, Am. App., p. 609.)

The next account of this event is contained in a book called the "Cruise of the Shenandoah," written by Hunt, one of her officers, after her cruise was finished, and published in London and in New York in 1867. He says that when they parted from the Laurel, "officers and men only numbered forty-two souls, less than half her regular complement." (Cruise of the Shenandoah, page 24, cited in the American Case.)

Temple's detailed account as corrected gives the names of forty-three persons on board. There is, therefore, almost absolute identity of recollection of three independent witnesses on this point.

We have two accounts of the number of men enlisted between the time of leaving the Laurel and the arrival of the vessel at Melbourne, which are thus stated in the American Case:

> The author of the Cruise of the Shenandoah says that fourteen were enlisted in this way: ten from the Alina and the Godfrey, two from the Susan, and two from the Stacey.
> Temple, in his affidavit, gives the names of three from the Alina, five from the Godfrey, one from the Susan, two from the Stacey, and one from the Edward; in all twelve.

Here, again, the trifling discrepancy confirms the general truthfulness of the recollection of each witness. According to Hunt's account, she had, on arriving in Melbourne, fifty-five men all told. In Temple's affidavit, with the addition of Sylvester, we have the names of fifty-four men, viz, twenty-five officers and thirty men.

Other corroborating testimony sustains the truth of the statements. In the sixth volume of the American Appendix there are several affidavits of persons who left the ship at Melbourne. Brackett (on page 615) says, "during the whole time I was on board, out of about thirty-five, making the crew of the said steamer, there was," &c., &c. He also states that he, and four others named by him, to avoid punishment, consented to serve as seamen on the steamer. Bolin, (page 615,) Scandall, (page 615,) Ford, (page 612,) Scott, (page 616,) Lindburg, (page 617,) Wicke,

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mécaniciens-pompiers, qui quittèrent le Sea King dans le même but. Quant au Sea King, ce compte est confirmé par l'*affidavit* de Sylvester (vol. 6, Am. App., p. 607).

Un troisième récit de cet évènement se trouve dans un livre intitulé "Croisière du Shenandoah" écrit par Hunt, l'un de ses officiers après la fin de sa croisière, et publié à Londres et à New York en 1867. Il dit que lorsqu'ils quittèrent le Laurel, il n'y avait en tout en fait d'officiers et de matelots que quarante-deux hommes, moins de la moitié de l'effectif régulier (Croisière du Shenandoah, p. 24, cité dans le cas américain).

Le récit détaillé de Temple ainsi corrigé, donne les noms de quarante-trois personnes se trouvant à bord. Les souvenirs de trois témoins indépendants sont donc sur ce point presque absolument identiques.

Nous avons deux rapports quant au nombre des hommes enrôlés entre le départ du Laurel et l'arrivée du vaisseau à Melbourne; ils se trouvent exprimés comme suit dans le cas de l'Amérique:

"L'auteur de la Croisière du Shenandoah dit que quatorze hommes furent enrôlés de la manière suivante: dix furent triés de l'Alina et du Godfrey, deux de la Susan et deux du Stacer.

"Temple dans son *affidavit*, donne les noms de trois hommes tirés de l'Alina, de cinq du Godfrey, d'un de la Susan, de deux du Stacer, et d'un de l'Édouard, en tout douze."

Ici encore, la petite différence confirme l'exactitude des souvenirs de chaque témoin.

Selon Hunt, le Shenandoah avait en arrivant à Melbourne, 55 hommes tout compris. Dans l'affidavit de Temple, en ajoutant Silvester, nous trouvons les noms de 55 hommes, soit 25 officers et 30 hommes.

D'autres témoignages corroborant ceux-ci, démontrent la vérité de ces déclarations. Dans le 6e volume de l'appendice américain, se trouvent plusieurs *affidavits* de personnes qui ont quitté le vaisseau à Melbourne. Brackett (p. 615) dit: "Pendant tout le temps que j'ai passé à bord du vaisseau, des 35 hommes environ composant l'équipage du dit vapeur, il y avait, etc., etc." Il déclare aussi, qu'avec quatre camarades dont il donne les noms, ils consentirent, pour éviter d'être punis, à servir comme matelots sur le navire. Bolin (p. 615), Ford (p. 612), Scandall (p. 615), Scott (p. 616),

(page 625,) and Behiecke, (page 626,) say the same thing; in all twelve persons. Two of the names mentioned by Brackett are on Temple's list of enlisted men. Adding ten to Temple's list, it makes forty, or five more than the number given by Brackett as "about" the crew. Adding it to Hunt's list it gives forty-one.

An estimate derived in a roundabout way from the United States Consul at Rio de Janeiro, from the accounts of masters of vessels captured by the Shenandoah, who had reached there on their way home, confirms the truth of these figures. He says: "The following statement in regard to the Shenandoah is made by ship-masters who have been prisoners on board of her. * * * She has forty-three men, nearly all English, besides the officers." These statements were made to Consul Munro by persons who left the Shenandoah after she had received the additions made to her crew before arriving at Melbourne.

We are justified in assuming that Hunt's and Temple's accounts represent the number of men she had on board on arriving in Melbourne.

The next inquiry is how many did she lose there.

Police-Officer Kennedy, of Melbourne, in his report dated February 13 states that "twenty men have been discharged from the Shenandoah since arrival at this port. (Brit. App., vol. 5, p. 108.)

Temple gives us the names of two who were discharged, Williams and Bruce, and says, in addition, "there were some men who left the ship at Melbourne, whose names I do not know." Sylvester says that he left at Melbourne. (Am. App., vol. 6, p. 609.) Brackett gives us the names of himself, Madden, and Flood, three in all. Bolin, Scandall, Scott, Landberg, Wicke, and Berucke make twelve. It appears by the affidavit of Bruce (Am. App., vol. 6, p. 605) and of Colby (same, p. 607) that they also worked on the vessel as part of the crew, and left at Melbourne. Thus it appears that out of the twenty thirteen were prisoners who had been captured and forced to serve on the Shenandoah, and who seized the first opportunity to leave the compulsory service.

Landberg (p. 617), Wicke (p. 625), et Berucke (p. 626), disent la même chose, soit en tout douze personnes. Deux des noms mentionnés par Brackett se trouvent sur la liste de Temple. En ajoutant dix noms à la liste de Temple nous avons 40, c'est-à-dire cinq de plus que le nombre donné par Brackett comme composant à *peu près* l'équipage. En l'ajoutant à la liste de Hunt, nous avons 41, qui est le chiffre approximatif donné par le consul des États-Unis à Rio Janeiro, d'après les récits des maîtres de vaisseaux pris par le Shenandoah, qui, en entrant chez eux, avaient passé par cette ville. Le consul dit: "Le récit suivant quant au Shenandoah a été fait par des maîtres de vaisseaux qui ont été prisonniers à bord de ce vaisseau * * Il a 43 hommes, presque tous anglais, outre les officiers." Ces récits furent donnés au consul Munro par des personnes qui avaient quitté le Shenandoah, après qu'il eut augmenté son équipage, avant d'arriver à Melbourne.

Nous pouvons par conséquent supposer que les chiffres indiqués par Hunt et Temple représentent le nombre des hommes que le vaisseau avait à bord en arrivant à Melbourne.

Cherchons maintenant à savoir combien il en perdit dans cette ville.

L'officier de police, Kennedy de Melbourne, dans son rapport du 13 février, déclare que vingt hommes ont été renvoyés du Shenandoah depuis son arrivée dans le port. (Brit. App., vol. 5, p. 108.)

Temple nous donne les noms de deux hommes qui furent renvoyées, Williams et Bruce; et il ajoute: "Quelques hommes quittèrent le vaisseau à Melbourne, mais j'ignore leurs noms." Silvester dit qu'il quitta le vaisseau à Melbourne (Am. App., vol. 6, p. 609,) Bracket nous donne avec son nom ceux de Madden et de Flood, trois en tout; Bolin, Scandall, Scott, Landberg, Wicke et Berucke font douze. Il paraît, d'après les *affidavits* de Bruce (Am. App., vol. 6, p. 505) et de Colby (id., p. 607), qu'eux aussi travaillèrent à bord du vaisseau comme membres de l'équipage et le quittèrent à Melbourne. Ainsi il paraît que des vingt hommes, treize étaient des prisonniers qui avaient été obligés de travailler et de servir sur le Shenandoah, pour éviter une punition et qu'ils saisirent la première occasion de quitter ce service forcé.

We have no means of positively knowing the circumstances under which the others enlisted; but from the identity of result which will hereafter appear as derived from several independent sources, we think that they were not among the persons either referred to by Hunt or named by Temple as among the permanent crew of the vessel when she arrived in Melbourne, but were, like the thirteen whose names we can give, prisoners who had been forced into an unwilling service.

We feel perfectly convinced that, except Sylvester, no person was discharged from the Shenandoah at Melbourne except persons enlisted from captured vessels of the United States against their own will.

We next direct our inquiries to the number of enlistments made at Melbourne.

On the 27th of February, 1865, which was about a week after the Shenandoah left Melbourne, and when the facts were fresh in his mind, Governor Sir Charles Darling said that the reports and statements and letters from the chief commissioner of police in Victoria left "no doubt that the neutrality had been *flagrantly* violated by the commander of the Shenandoah," who had * * * received on board of his vessel, before he left the port on the 18th instant, a considerable number of men destined to augment the ship's company. (Brit. App., vol. i, p. 565.)

The report which is referred to in this statement is probably the one found on page 117 of vol. 5, of the British Appendix. In this report the detective states that five boat-loads of recruited men were seen to go on board the Shenandoah on the night of the 17th, one of which had ten or twelve men in it, of whom two returned; and that seven men had gone on board on the morning of the 18th. He concludes thus: "In preparing this report the detective has confined himself to facts; but it is stated that in all between sixty and seventy hands were shipped at this port."

The "facts" stated by the detective were true, and are supported by other proof. The rumors to which he referred were exaggerated.

Nous n'avons aucun moyen de savoir positivement dans quelles circonstances les autres s'enrôlèrent; mais d'après les résultats identiques, tels qu'ils dérivent de plusieurs sources indépendantes, comme nous le verrons plus bas, nous croyons qu'ils ne faisaient pas partie de ceux indiqués par Hunt ou par Temple comme composant l'équipage permanent du vaisseau lorsqu'il arriva à Melbourne, mais étaient, comme les treize dont nous pouvons donner les noms, des prisonniers qui avaient été forcés de faire ce service contre leur gré.

Nous sommes parfaitement convaincus, qu'à part Silvester, personne ne fut renvoyé du Shenandoah, à Melbourne, excepté des hommes enrôlés contre leur gré dans des vaisseaux capturés.

Nous dirigerons maintenant nos recherches sur le nombre des enrôlements faits à Melbourne.

Le 27 février 1865, une semaine environ après le départ du Shenandoah de Melbourne, et alors que sa mémoire était encore fraîche, le gouverneur sir Charles Darling déclara que les rapports et lettres du commissaire chef de police à "Victoria ne laissaient aucun doute que la neutralité eût été violée d'une manière flagrante par le commandant du Shenandoah qui * * avait reçu à bord de son vaisseau avant de quitter le port le 18 un nombre considérable d'hommes destinés à augmenter son équipage." (Brit. App., vol. 1, p. 565.)

Le rapport dont il est ici question, est probablement celui que l'on trouve à la page 117 du volume 5 de l'appendice britannique. Dans ce rapport, le *detective* déclare que cinq bateaux remplis d'hommes ont été vus se dirigeant sur le Shenandoah pendant la nuit du 17; l'un d'eux avait à bord dix à douze hommes, dont deux seuls revinrent, et que sept hommes s'étaient embarqués le 18 au matin. Il termine ainsi son rapport: "En préparant ce rapport, le *detective* s'est borné aux faits; mais l'on dit qu'en tout soixante à soixante-dix hommes se sont embarqués sur ce vaisseau, dans ce port."

Les faits cités par le *detective* sont vrais et corroborés par d'autres preuves. Les bruits dont il parlait étaient exagérés.

The author of the "Cruise of the Shenandoah" says that "the ship's company had received a mysterious addition of forty-five men." (Cruise of the Shenandoah, p. 113, referred to in the American Case.) This would seem to be about the number seen by the detective's informants.

Temple gives the names of thirteen petty officers, nineteen seamen, seven firemen, and three marines; in all, of forty-two persons who were recruited at Melbourne. This account agrees nearly with Hunt's, and is incidentally confirmed by Forbes' affidavit concerning Dunning, Evans, and Green, referred to in the American Case.

According to the figures to be gathered from Hunt's narrative, in various parts of it, the Shenandoah then had, after the Melbourne recruitments were added, one hundred and one officers and men. According to Temple's account, she had twenty-five officers, thirty petty officers, twenty-six seamen, nine firemen and three marines; in all, ninety-three persons.

The slight discrepancy may be accounted for by the fact that Hunt, in his rapid narrative, makes no mention of the discharge of men at Melbourne.

On the 27th of May, the Shenandoah captured and burned the whaler Abigail. Mr. Ebenezer F. Nye, the master of the Abigail, in an affidavit sworn to on the 7th of September, 1871, says: "The Shenandoah at the time I was taken on board had a full complement of officers, but was very much in want of seamen, having only forty-five or fifty, not half the number she needed. The officers told me that her full complement of officers and crew was one hundred and eighty-five, but at that time she had one hundred and five all told."

It appears from Temple's affidavit that after leaving Melbourne and before the capture of the Abigail, the crew was increased by the enlistment of one petty officer and seven seamen from captured vessels, viz: Park, officer, and Welch, Morris, Adeis, Delombaz, Roderick, Stevenson, and Rossel, seamen. According to the calculations derived from Hunt's narrative, therefore, she should have had at that time, with this addition, 108 persons, officers and crew.

L'auteur de la croisière du Shenandoah dit que "l'équipage avait reçu une augmentation mystérieuse de quarante-cinq hommes," (p. 113, voy. *American Case*). Ce nombre semble être celui qui fut remarqué par ceux qui donnèrent ces informations au *detective*.

Temple donne les noms de 1 officier, 13 officiers subalternes, 19 matelots, 7 mécaniciens-pompiers et 3 soldats de marine, en tout 43 hommes recrutés à Melbourne. Ce récit s'accorde assez avec celui de Hunt et se trouve incidemment confirmé par l'*affidavit* de Forbes au sujet de Dunning, Evans et Green cités dans le cas de l'Amérique.

Selon les chiffres que l'on peut recueiller du récit de Hunt, dans différentes parties de ce récit, le Shenandoah avait alors, après les enrôlements à Melbourne, 101 officiers et matelots.

Selon le récit de Temple, il avait 25 officiers, 30 officiers subalternes, 26 matelots, 9 et 3 soldats de marine, en tout 93 hommes.

La petite différence peut s'expliquer par le fait que Hunt, dans son récit rapide ne fait aucune mention du renvoi des hommes à Melbourne.

Le 27 mai, le Shenandoah prit et brûla le baleinier Abigaïl. M. Ebenezer F. Nye, le maître de l'Abigaïl, dans un *affidavit* du 7 septembre 1871 dit: "Le Shenandoah, à l'époque où je fus pris à bord, avait un nombre complet d'officiers mais manquait passablement de matelots, car il n'en avait que quarante ou cinquante, pas la moitié de ce qu'il fallait. Les officiers m'ont dit que leur véritable effectif d'officiers et de matelots aurait dû être de 185, mais à cette époque, il avait, tout compris, 105 hommes."

Il paraît, d'après l'*affidavit* de Temple, qu'après avoir quitté Melbourne, et avant la capture de l'Abigaïl, l'équipage fut augmenté par l'embauchage d'un officier subalterne et de sept matelots tirés de vaisseaux capturés, soit: Park, officier, et Welch, Morris, Adeis, Delombaz, Roderick, Stevenson et Rossel, matelots.

D'après les calculs tirés du récit de Hunt, le Shenandoah devait par conséquent avoir à cette époque, avec cette augmentation, 108 hommes tout compris.

According to Temple's account she had one hundred and one such persons, of whom fifty-seven were officers and petty officers, and forty-four were either seamen, marines, or firemen. This result confirms the accuracy of Mr. Nye's estimates and recollection in a striking manner.

After that time, Temple represents the Senandoah as receiving recruitments from captured vessels, as follows: one officer, twenty-one seamen, one fireman, and nine marines; in all, thirty-two persons. He represents the vessel as arriving at Liverpool with one hundred and thirty-three persons on board.

In an official report made by Captain Paynter to the Controller-General of the British Coast Guard, dated November 7, 1865, (Brit. App vol. 1, page 675,) it is stated that "the Shenandoah has a complement of one hundred and thirty-three officers and men."

Temple, in his affidavit sworn to the 6th day of the following December, gives the identical number, and adds the names of the officers and men. When this affidavit was communicated to the British Government an attempt was made to impeach his veracity by efforts to show that his general character did not entitle his statement to credit; but no attempt was made to show that the list attached to his affidavit was in any respect incorrect, undoubtedly because the persons in Liverpool who knew the facts knew it to be true. The attempt was made by Captain Paynter, the officer who took charge of the Shenandoah after she was abandoned by Waddell, and under whose direction the crew was discharged. He therefore either knew whether the facts were correct, or, if they were incorrect, where the persons could be found who could show that they were so. In discharging the crew he undoubtedly had the crew list. If Temple's list had varied from the ship's crew list, it is certain that such variance would have been shown by an officer anxious to prove him unworthy of credit.

Temple's list is supported, 1st. By its intrinsic truthfulness. 2d. By its substantial agreement with Hunt's account. 3d. By the shipmaster's statements reported to Consul Munro, at Rio Janeiro. 4th. By the

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D'après le récit de Temple, il avait 101 hommes, dont étaiént 57 officiers et officiers subalternes, et 44 matelots, soldats de marine et mécaniciens.

Ce résultat confirme l'exactitude de l'estimation et les souvenirs de M. Nye de la manière la plus frappante.

Après cette époque, Temple représente le Shenandoah comme recevant des enrôlements des vaisseaux capturés comme suit: 1 officier, 21 matelots, 1 mécanicien-pompier, et 9 soldats de marine, en tout 32 hommes. Il représente le vaisseau arrivant à Liverpool avec 133 hommes à bord.

Dans un rapport officiel écrit par le capitaine Paynter au contrôleur général des gardes-côtes britanniques, daté du 7 novembre 1865 (Brit. App. vol. 1, p. 675) il est declaré "que le Shenandoah a un effectif de 133 officiers et matelots."

Temple, dans son *affidavit* du 6 décembre suivant, donne des chiffres identiques et ajoute les noms des officiers et des matelots.

Lorsque l'*affidavit* de Temple fut communiqué au gouvernement britannique, on chercha à mettre en doute sa véracité en montrant que son caractère n'inspirait pas de la confiance dans ses déclarations; mais on ne chercha nullement à montrer que la liste annexé à son *affidavit* était incorrect:—sans doute parce que les personnes à Liverpool qui connaissaient les faits savaient que cette liste était vraie. Celui qui éleva ces doutes, fut le capitaine Paynter, l'officier qui se chargea du Shenandoah lorsqu'il fut abandonné par Waddell et conformément aux instructions duquel l'équipage fut renvoyé. Il savait par conséquent si ces faits étaient exacts:—ou s'ils ne l'étaient pas, il savait où on pouvait trouver les personnes qui pouvaient démontrer leur inexactitude. En renvoyant l'équipage, il avait sans doute tenu la liste de l'équipage. Si la liste de Temple avait différé de celle là, il est évident que cette différence aurait été démontrée par un officier désireux de faire passer Temple comme indigne de foi.

La liste donnée par Temple est appuyée: 1°, par sa véracité intrinséque; 2°, par son accord avec le récit de Hunt; 3°, par les récits des maitres des vaisseaux capturés, récits rapportés par le consul Munro à Rio Janeiro; 4°, par les *affidavits* de plusieurs

affidavits of several captured seamen released at Melbourne from involuntary service on the Shenandoah. 5th. By the letter of the Governor, Sir Charles Darling. 6th. By the report of Detective Kennedy. 7th. By the affidavit of Forbes. 8th. By the affidavit of Nye, the commander of the Abagail. 9th. By the report of Captain Paynter to the controller-general of the coast guard. 10th. By the fact that Captain Paynter was not able to disprove it when he had the motive to do so, and when the means were within his power. If this account is to be believed, forty-three persons recruited at Melbourne, in violation of the duties of Great Britain as a neutral, joined the Shenandoah, namely, one officer, thirteen petty officers, nineteen seamen, seventy-five men, and three marines from that port, and, with one exception, no person left it there who had not been first captured as a prisoner, and then compelled under duress to do involuntary service on board.

The figures in this paper are the result of a critical examination of the documents referred to. Where they differ from those hitherto presented, they are to be taken as a revision of our former documents.

GENEVA, *August* 21, 1872.

Analysis of the list accompanying the affidavit of William A. Temple.

Came out in the Laurel—22 officers: Waddell, Grimball, Lee, Chen, Scales, Lining, McUlty, O'Brien, Codd, McGuffney, Bullock, Brown, Mason, Hunt, Minor, Colton, Smith, Howard, Guy, Lynch, O'Shea, Alcott; 10 petty officers: Moran, Warren, Bronnan, Hall, Crawford, Wiggins, Fenner, Griffith, Fox, Jones; 2 firemen: Marshall, Rawlinson; 3 seamen: Simpson, Rose, Oar—37.

Came out in the Sea King—2 officers: Whittle, Hutchinson; 1 seaman: Jones; 2 firemen: Martin, Clark—5.

Enlisted from captures made before arriving at Melbourne—9 petty officers: Rowe, Raymond, Wert, Davy, Hanson, Taft, Hopkins, Williams, Bruce; 3 seamen: Way, Blacking, Floyd—12.

Discharged at Melbourne—2 petty officers: Williams, Bruce—2.

Enlisted at Melbourne—1 officer: Blackar; 13 petty officers: Dunning, Strong, Collery, James, Spring, Burk, Exshaw, Glover, McLaren, Marlow, Smith, Alexander, Canning; 19 seamen: Collins, Foran, Kerney, McDonald, Ramsdale, Kilgower, Swanton, Moss, Fegan, Crooks, Simms, Hill, Hutchinson, Evans, Morton, Gifford, Ross, Williams, Simmons; 7 firemen: McLane, Brice, Green, Burges, Mullineaux, Southerland, Shatton; 3 marines: Riley, Kenyon, Brown—43.

Enlisted after leaving Melbourne and before capture of the Abagail—1 petty officer: Park; 7 seamen: Welch, Morris, Adies, Delombas, Roderick, Stevenson, Rosel—8.

Enlisted after capture of the Abagail—1 officer: Manning; 21 seamen: Hawthorn, Seaman, Graft, Kelley, Dowden, Colar, Patterson, Hilcox, Canning, Vanerery, Bill, Givens, Mahoe, Long, California, French, Sailer, Brown, Kanaca, Boy, Wicks; 1 fireman: Carr; 9 marines: Murray, Silver, Burnet, Barry, Floyd, Ivors, Poulson, Clury, Grimes—32.

Died on the voyage—1 petty officer: Canning; 1 seaman: Bill—2.

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matelots prisonniers relâchés à Melbourne d'un service forcé sur le Shenandoah; 5°, par la lettre du gouverneur sir Charles Darling; 6°, par le rapport du *detective* Kennedy; 7°, par l'*affidavit* de Forbes; 8°, par l'*affidavit* de Nye, le commandant de l'Abigail; 9°, par le rapport du capitaine Paynter au contrôleur général des gardes-côtes; 10°, par le fait que le capitaine Paynter ne pût réussir à en contester l'exactitude, lorsqu'il avait les raisons et les moyens de le faire.

Si l'on doit croire ce récit, 43 personnes recrutées à Melbourne, en violation des devoirs de la Grande-Bretagne comme puissance neutre, s'embarquèrent sur le Shenandoah dans ce port: ce furent 1 officier, 13 officiers subalternes, 19 matelots, 7 mécaniciens-pompiers et trois soldats de marine, et, sans exception, personne dans ce port ne le quitta qui n'eût été d'abord fait prisonnier et obligé par force de faire le service à bord du vaisseau.

Les chiffres de cette écriture sont le résultat d'un examen critique des documents cités; lorsqu'ils diffèrent de ceux présentés jusqu'ici, ils doivent être pris comme une révision de nos documents précédents.

Genève, le 21 août 1872.

IX.—ARGUMENT OF SIR ROUNDELL PALMER ON THE SPECIAL QUESTION AS TO THE LEGAL EFFECT OF THE ENTRANCE OF THE FLORIDA INTO THE PORT OF MOBILE, ON THE RESPONSIBILITY, IF ANY, OF GREAT BRITAIN FOR THAT SHIP.

It is important to consider the principle applicable to the special case of the Florida, after she had entered the Confederate port of Mobile, and there remained several months and enlisted a new crew, before cruising or committing hostilities against the shipping of the United States. If the antecedent circumstances, applicable to this vessel, are such as (in the view of the Tribunal) to justify the conclusion that any want of due diligence, in respect to her, can be imputed to Great Britain, the question arises, whether such want of due diligence involves, as its legitimate consequence, responsibility for her acts, in the view of the fact that she never cruised or committed any acts of hostility against the United States until after she had been for a long interval of time in a Confederate port, and had thence issued as a duly commissioned Confederate cruiser, and in an altered condition as to her capacity for war.

The facts which occurred as to this vessel are really not distinguishable, in principle, from the case of a ship of war transported from a neutral to a belligerent country by a breach of blockade, manned and made capable of cruising for the first time in the belligerent country, and afterward actually cruising from thence. It is certain that the crew which was hired to sail with the Florida from England to Nassau, was not hired, and did not serve, for any purpose of war; it is equally certain that no sufficient crew for such purpose was obtained by her in the Bahamas, or elsewhere within any British possession.[1] She did not enter the port of Mobile simply *in transitu*, or as a point of immediate departure for a subsequent cruise, for which the necessary preparation had been already made within British territory; but she remained there more than four months, from the 4th of September, 1863, to the 15th of January, 1864.[2] She there engaged the crew which enabled her to go to sea, and to commit hostilities against the shipping of the United States.[3]

On what principle would such a case as this have been dealt with by international law, if the question had not been one of national responsibility, sought to be cast upon Great Britain, but had arisen under the well-established rules applicable to neutral citizens concerned in breaches of blockade, and in the conveyance of contraband of war to an enemy? If the direct agents in conveying the Florida into Mobile (supposing she had been brought in by and under the charge of another British ship) would not have been under any continuing responsibility by international law, after leaving her there and returning to their own country, how can it be said that such a continuing responsibility ought to attach upon the nation from whose territory she was sent out, merely for want of the use of due diligence to prevent that transaction? Professor

[1] United States App., vol. vi, pp. 307, 331.
[2] Ibid., p. 334.
[3] Brit. App., vol. i, pp. 117, 120-122.

Bluntschli, in his paper on the Alabama question, ("Revue de droit international," 1870,) says, (page 473:)

Il ne faut d'ailleurs pas perdre de vue que tous ces effets désastreux sont en premier lieu imputables, non pas au gouvernement anglais, mais aux croiseurs eux-mêmes. Personne n'accusera le gouvernement anglais d'avoir donné mission de détruire les navires de commerce américains ou d'avoir, par ses agissements, entravé ou endommagé la marine américaine. Ce que l'on peut lui reprocher à bon droit, en supposant que les faits cités plus haut doivent être considérés comme avoués ou prouvés, ce n'est pas un *fait*, mais une *omission contre le droit*. Sa faute ne consiste pas à avoir équipé et appareillé les corsaires, mais à *n'avoir pas empêché* leur armement et leur sortie de son territoire neutre. Mais cette *faute* n'a qu'un rapport *indirect*, et nullement un rapport *direct*, avec les déprédations réellement commises par les corsaires.[1]

In the case of a breach of blockade the offense is deemed by international law to be "deposited," and the offense of the neutral vessel to be terminated when she has once completed her return voyage. "The penalty," says Chancellor Kent, "never travels on with the vessel further than to the end of the return voyage; and, if she is taken in any part of that voyage, she is taken *in delicto*." (Commentaries, vol. i, p. 151.) As to contraband, the law is thus stated in Wheaton's "Elements," (Lawrence's Edition, p. 809:)

The general rule as to contraband articles, as laid down by Sir W. Scott, is, that the articles must be taken *in delicto*, in the actual prosecution of the voyage to an enemy's port. Under the present understanding of the law of nations you cannot generally take the proceeds in the return voyage. From the moment of quitting port on a hostile destination, indeed, the offense is complete, and it is not necessary to wait till the goods are actually endeavoring to enter the enemy's port; but beyond that, if the goods are not taken *in delicto*, and in the actual prosecution of such a voyage, the penalty is not now generally held to attach.

Mr. Wheaton adds, by way of qualification, that "the same learned judge applied a different rule in other cases of contraband, carried from Europe to the East Indies, with false papers and false destination, intended to conceal the real object of the expedition, where the return cargo, the proceeds of the outward cargo taken on the return voyage, was held liable to condemnation." These were the cases of the Rosalie and Betty and the Nancy; as to which, in a note, the learned author says:

The soundness of these last decisions may be well questioned; for, in order to sustain the penalty, there must be, on principle, a *delictum* at the moment of seizure. To subject the property to confiscation while the offense no longer continues, would be to extend it indefinitely, not only to the return voyage, but to all future cargoes of the vessel, which would thus never be purified from the contagion communicated by the contraband articles.

If the analogy of these cases is followed, (and what nearer analogy can be suggested?) Great Britain cannot be held responsible for the cruises of the Florida after her departure from Mobile in January, 1864.

The case of the Gran Para (reported in the seventh volume of Mr. Wheaton's Decisions in the Supreme Court of the United States, p. 471)[2] is certainly not an authority for any contrary principle or conclusion. The question there was, not whether any authority of the United States should seize or detain the ship Irresistible, (then in the war service of General Artigas as chief of the so-called "Oriental Republic,") which was held to have been illegally fitted out in a port of the United States, in violation of the neutrality law of that country—much less whether the United States ought to be held responsible for any of her captures upon the high seas—but solely, whether the cruise on which she had taken a prize, (the Gran Para,) which was actually brought into a port

[1] The italics in this quotation are in the original text of M. Bluntschli.

[2] See also Brit. App. vol. iii, p. 91.

of the United States, was so disconnected from her original illegal outfit, by the fact of her having been at Buenos Ayres during the interval, as to make it proper for the Courts of the United States to refuse to exercise jurisdiction for the purpose of restoring that prize to her original Portuguese owner? Upon the whole circumstances of the case this question was determined in the negative. The material facts being that the Irresistible was built at Baltimore, in all respects, for purposes of war; that she there enlisted a crew of about fifty men, and took in a sufficient armament for the purpose of the cruise in which she was afterwards engaged; that she went to Buenos Ayres, staid there only a few weeks, went through the form of discharging, but immediately afterwards re-enlisted, substantially, the same crew; obtained no new outfit or armament; took a commission from the Government of Buenos Ayres to cruise against Spain, *but sent back that commission on the very next day after leaving the port, when the officer in command produced a wholly different commission from General Artigas, as chief of the "Oriental Republic," under which he proceeded actually to cruise.* It was with reference to this state of circumstances, (so different from the facts relative to the Florida at Mobile,) that Chief Justice Marshall held that this was a colorable, and not a real termination of the original cruise.

> The principle, (he said) is now finally settled, that prizes made by vessels which have violated the Acts of Congress that have been enacted for the preservation of the neutrality of the United States, if brought within their territory, shall be restored. The question therefore is, does this case come within the principle?
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> *This Court has never decided that the offense adheres to the vessel, whatever changes may have taken place, and cannot be deposited at the termination of the cruise in preparing for which it was committed;* and, as the Irresistible made no prize on her passage from Baltimore to the River La Plata, it is contended that the offense was deposited there, and that the Court cannot connect her subsequent cruise with the transactions at Baltimore.
>
> If this were to be admitted *in such a case as this*, the laws for the preservation of our neutrality would be completely eluded, so far as this enforcement depends on the restitution of prizes made in violation of them. Vessels completely fitted in our ports for military operations need only sail to a belligerent port, and there, after obtaining a commission, go through the ceremony of discharging and re-enlisting their crew, to become perfectly legitimate cruisers, purified from every taint contracted *at the place where all their real force and capacity for annoyance was acquired.* This would indeed be a fraudulent neutrality, disgraceful to our own Government, and of which no nation would be the dupe. It is impossible for a moment to disguise the facts, that the arms and ammunition taken on board the Irresistible at Baltimore were taken for the purpose of being used on a cruise, and that the men there enlisted, though engaged in form as for a commercial voyage, were not so engaged in fact.

It is submitted that there is nothing whatever, in the view thus taken by Chief Justice Marshall, which can have any tendency to establish the responsibility of Great Britain for captures of the Florida, made after she left Mobile, and never brought into any British port. The simple ground of the decision was that which the Chief Justice announced at the beginning of his judgment:

> The principle is now firmly settled, that prizes made by vessels which have violated the Acts of Congress that have been enacted for the preservation of the neutrality of the United States, if brought within their territory, shall be restored. The only question, therefore, is, does this case come within the principle?

And it was held to be within that principle, not because the offense was one which could never be "deposited," but because the "deposition" relied upon in that case was *not real* but only pretended.

That case, in fact, fell short of deciding so much even as this: that if a prize, taken by the Florida after her departure from Mobile, had been brought into a British port, and if the same rule as to the restitution of prizes, which is the settled and known law of the United States, had also been the settled and known law of Great Britain, such a prize

ought to have been restored to her original owners. This is the utmost extent to which the authority of the case of the Gran Para could ever be supposed to go. But the circumstances are, in all essential points, so widely dissimilar, as to make it no authority, even for that limited purpose.

If, in such a case as that of the Florida, the neutral State were held liable for the captures made by her in her first cruise, after leaving Mobile, it seems unavoidably to follow (and this appears to be the conclusion actually insisted on by the United States) that there must be unlimited liability for *all* her subsequent cruises, and that the offense could never be "deposited."

But this is not only not a just inference from, it is in fact contradictory to, the doctrine to which Chief Justice Marshall has always been understood in the United States to have given the sanction of his authority in the Gran Para case. Part of the *Rubric*, or marginal note, prefixed by the reporter to that case, is in these words: "*A bonâ fide termination of the cruise, for which the illegal armament was here obtained, puts an end to the disability growing out of our neutrality laws which does not attach indefinitely.*"

The Florida could not have cruised without a proper crew; it was in a port of her own country that she first obtained such a crew, and so acquired the capacity of cruising. The equipment, which she had received before reaching Mobile, was therefore only partial and incomplete. Even assuming that she obtained this equipment under circumstances which involved some failure in the use of proper diligence on the part of Great Britain, on what principle can Great Britain be charged with all her subsequent captures? Would not such a principle involve the liability of a neutral State to be charged with all captures made by a vessel which had obtained, within its territory, through some want of due diligence on the part of its authorities, any kind or degree whatever of equipment, or augmentation of warlike force, however impossible it might be to prove that such equipment or augmentation of force was the proximate cause of any of her captures, and in however large a degree other causes may have evidently contributed to her means of offense? If what was done to the Florida at Mobile had been done in a Spanish port, by the permission or culpable neglect of the authorities; if, after lying for four months in a Spanish port, she had there, for the first time, obtained a fighting crew, and had been dispatched from thence to prey upon American commerce, would it still have been contended that Great Britain, and not Spain, was liable? Or would it have been contended that both Great Britain and Spain were liable, under such circumstances, and that the liability of both was indefinite and unlimited till the conclusion of the war? Will the Tribunal give its sanction to such doctrines as these, not only without any aid from authority, but in opposition to all the light which is derivable from the reason and analogy of the doctrines of international jurisprudence, and of the jurisprudence of the United States themselves, in other cases, which ought to be governed by similar principles?

The legitimate inference, from the analogy of the law as to breach of contraband, is, that any responsibility which Great Britain may have been under as the neutral State from which the Florida was introduced into Mobile, came to its natural end when (having previously committed no act of war) she was once at home in that port, and became *bona fide* incorporated, within their own territory, into the naval force of the Confederate States. The legitimate inference from the doctrine of Chief Justice Marshall, in the case of the Gran Para, is, that having been once

bona fide received into Mobile, as her proper port, and having been there manned, and dispatched from thence for her subsequent cruise, an effectual line of separation was drawn, for all legal and international purposes, between everything which had occurred before she entered into that port and everything which occurred afterward; and that (no hostile cruising against the United States having taken place during the interval between her leaving Liverpool and her entrance into Mobile) Great Britain had no just cause for afterward refusing to her the ordinary immunities and privileges of a duly-commissioned ship of war of a belligerent Power, and certainly was not under any obligation toward the United States to do so, even if a different rule would have been applicable to such a ship as the Alabama, which was not dispatched for her cruise from any Confederate port.

As between Great Britain and the Florida the case stood thus. Her acquittal at Nassau was conclusive, as a judgment *in rem*, so as to make it unjustifiable and impossible for any British authority afterward to revive against her the causes of complaint which had occurred before that acquittal; and her subsequent reception of an armament at Green Cay, not being accompanied or preceded by the enlistment of any crew sufficient for hostilities, and not being followed by any warlike operations before her entrance into Mobile, though it was an infringement of British municipal law, was not such an offense by genera linternational law as to call for or justify war or reprisals against the Confederate States, nor such as to adhere to the ship through all subsequent circumstances. The responsibility of Great Britain to the United States, in respect of this ship, could not exceed the responsibility of the Confederate States, in respect of the same ship, to Great Britain.

ROUNDELL PALMER.

X.—REPLY OF THE COUNSEL OF THE UNITED STATES TO THE ARGUMENT OF HER BRITANNIC MAJESTY'S COUNSEL ON THE SPECIAL QUESTION OF THE LEGAL EFFECT, IF ANY, OF THE ENTRY OF THE FLORIDA INTO THE PORT OF MOBILE, AFTER LEAVING THE BAHAMAS, AND BEFORE MAKING ANY CAPTURES.

The Florida, after her illegal outfit as a ship of war in the neutral territory of Great Britain, and the completion of her armament, warlike munitions, and crew from the same neutral territory, took the seas under a Confederate commission, and after an unsuccessful attempt to add to her complement of men by violating the neutrality of Spain, slipped into Mobile by a fraudulent imposition upon the blockading vessels, which her British origin enabled her to practice. She was there imprisoned four months before she was able to elude the vigilance of the blockaders, and she obtained there, it is said, some addition to the force of the crew which she had when she entered that port. Her captures were made *after* she left Mobile, and a question of public law is now raised upon this state of facts, to this effect: "Is the responsibility of Great Britain to the United States for the depredations of the Florida relieved by this visit of that cruiser to a Confederate port under the circumstances in evidence?" The question assumed that, but for this visit, the neutral responsibility for the acts of this cruiser would exist, and seeks to arrive at the significance, if any, of this visit in relieving the neutral from such responsibility. The Counsel of Her Britannic Majesty has discussed this question, and we now offer a brief reply to his Argument.

I. It is said that a limitation upon a neutral's responsibility for the acts of a cruiser, for which the neutral would otherwise continue to be responsible, may be found in the *principle* of the rule by which neutral trade in contraband of war and belligerent right to prevent it are regulated. This rule is understood to be, that the belligerent right to intercept or punish trade in contraband, carried on by a neutral, must be exercised *during the guilty voyage*, and that *its* termination ends the belligerent's redress and the neutral's exposure. The view which we take of this suggestion makes it unnecessary to consider whether the more strict or the more liberal measure of the duration of the guilty voyage is the proper one.

It seems to us that it needs but little attention to the nature of this struggle between neutral *right* to trade and belligerent *right* to restrict and defeat that trade, and to the solution of these conflicting and competing rights which the law of nations has furnished, to reject the analogy as valueless in the present discussion.

Neutral nations properly insist that their trade is not to be surrendered because of the war between the two belligerents. But they concede that the belligerent Powers, as against each other, may rightfully aim at the restriction or destruction of each other's commerce. How far the belligerent may press against his enemy's commerce, which, in turn, is also the neutral's commerce, and how much the neutral must acquiesce in *its* commerce being dealt with in its character of being also the enemy's

commerce, is the problem to be solved in the interest of preserving peace with the neutrals, and restricting the war to the original belligerents.

The solution arrived at, and firmly and wisely established, covers the three grounds of (1) neutral trade with ports of the enemy under actual blockade; (2) visitation and search of neutral ships to verify the property, in ship and cargo, as being really neutral; (3) the interception and condemnation of contraband of war, though really of neutral ownership and though not bound to a blockaded port. It is with the last only that we have to deal.

There were but three modes in which the consent of nations could dispose of this question of contraband trade. First, It might have been proscribed as *hostile*, and, therefore, criminal, involving the nation suffering or permitting it, or not using due diligence to prevent it, in complicity with and responsibility for it. This has been contended for as the true principle by able publicists, but has not obtained the consent of nations. Second, It might have been pronounced as free from belligerent control as all other neutral commerce, submitting only to verification as really neutral in ownership, and to exclusion only from blockaded ports. This has been contended for, but has not been accepted.

The only other disposition of this conflict of rights and interests at all reasonable is that which has been actually accepted and now constitutes a rule of the law of nations. This limits the right of the belligerent, and the exposure of the neutral, to the *prevention* of the trade in contraband by warlike force for capture, and prize jurisdiction for forfeiture. Manifestly, the natural, perhaps the necessary, limit of this right and exposure, by the very terms of the rule itself, would be *flagrante delicto* or during the guilty voyage. To go beyond this would, in principle, depart from the reason of the actual rule and carry you to the ground of this trade being a *hostile act* in the sense in which the consent of nations has refused so to regard it. But, to adhere to the *principle* on which the rule stands and attempt to carry its *application* beyond the period of perpetration, would involve practical difficulties wholly insurmountable, and encroachments upon innocent neutral commerce wholly insupportable. How could you pursue the contraband merchandise itself in its subsequent passage, through the distributive processes of trade, into innocent neutral hands? But, while it remained in belligerent hands, it needs no other fact to expose it to belligerent operations, irrespective of its character or origin. Again, how can you affect the vessel which has been the guilty vehicle of the contraband merchandise in a former voyage, with a permanent exposure to belligerent force for the original delict, without subjecting general neutral trade to inflictions, which are in the nature of *forcible punishment*, by the belligerent of the neutral nation, as for hostile acts exposing the neutral nation to this general punitive harassment of its trade?

It will, we think, be readily seen that this *analogy* to contraband trade, as giving the measure of the endurance of the responsibility of Great Britain for the hostile expedition of the Florida, is but a subtle form of the general argument, *that the outfit of the Florida was but a dealing in contraband of war, and was to carry no other consequence of responsibility than the law of nations affixed to that dealing.* But this argument has been suppressed by the Rules of the Treaty, and need be no further considered.

II. The criticism on the celebrated judgment of Chief Justice Marshall, in the case of the Gran Para, does not seem to shake its force as authoritative upon the precise point under discussion, to wit, whether a visit to a belligerent port terminated the neutral's duty and responsi-

bility in respect of a vessel which, in its origin and previous character, lay at the neutral's charge. It is not profitable to consider the special distinctions which may be drawn between the facts of the Gran Para and of the Florida in this respect. If it is supposed that *other* circumstances than the *mere* visit of the Florida to a Confederate port divested her of being any longer an instrument of rebel maritime war, furnished from the neutral nation, we fail to find in the evidence any support to such suggestions. Certainly, the fact, if it existed or was shown by any definite evidence, of the fluctuating element of actual hostilities, or navigation in the presence on board of substituted or added seamen, does not divest the cruiser, its armament, its munitions, and its setting forth to take and keep the seas, of their British origin and British responsibility. These all continued up to the violation of the blockade, which they enabled the Florida to make. They equally enabled it to take and to use in the hostile cruise the enlistments at Mobile. Yet, if there be anything in the learned Counsel's argument, it comes to this: that the *seamen* enlisted at Mobile became, thereafter, the effective maritime war of the Florida, and the cruiser and her warlike and navigable qualities "suffered a sea change," which divested them of all British character and responsibility. This reasoning is an inversion of the proposition, *Omne principale ad se trahit accessorium.*

III. As a matter of fact, the evidence concerning what happened at Mobile by no means exhibits the crew with which the Florida left Mobile as *original* enlistments there. The force she took from Nassau, and which enabled her to make the port of Mobile, must have adhered to her. All the motives for such adherence continued in full force, and in a port without ships or trade, and so absolutely closed as Mobile was, there was no possible chance for them, as seamen, except to adhere to the Florida. The evidence does not contain any shipping articles, either at Nassau or at Mobile, and the list made by, or for verification by, Thomson at Liverpool, in reference to prosecutions under the Foreign-Enlistment Act, was made only in reference to nationality and the place where, within Thomson's knowledge, (who did first join her at Mobile,) *he found them connected with the Florida.* Very possibly a form of enlistment or engagement, as from Mobile as the place of departure, if they could ever get out, for the purposes of wages or otherwise, may have been gone through at Mobile, though it is not so proved. A perusal of Thomson's affidavit will show that it, and the accompanying list, relate only to crew *dating* on the cruise from Mobile, or from later recruitment, and that he imports to give no evidence that there were not *re-enlistments* at Mobile of her former crew, except in his own case, or by incidental inference, perhaps, in some others.

IV. The learned Counsel diverges, as it seems to us, from the point open for discussion into a somewhat vague inquiry as to what should be the consequences in respect of *indemnity* to the United States, from the responsibility of Great Britain for the violations of her obligations as established by the three Rules of the Treaty, if the Tribunal should find Great Britain so responsible.

We have considered this subject in our Argument, submitted on the 15th of June, and need not renew that discussion unless it is required from us. Of course minute and artificial reasoning may attempt to make out that the *last* man essential to a crew for navigation or fighting, or the *last* rope or spar which she could not spare, was the guilty cause of all a cruiser's subsequent depredations, and that all preceding structure, fitment, armament, munitions, officers, and men, are absolved from any share of the guilt. This reasoning may point the wit of the

proverb that "it is the last ounce that breaks the camel's back," but will not go much further. The response is too immediate. What preceded is what gives the place and power for the casual incorporation of the new atom, and the preceding preparations laid foundation for these casual and fluctuating elements of prosperous war, and thereby, as well as directly, for the war itself. Again we have only need to repeat, "*Omne principale ad se trahit accessorium.*" The provisions of the Treaty plainly indicate what the responsibility for *indemnity* should be if the responsibility for *fault* be established.

C. CUSHING
WM. M. EVARTS.
M. R. WAITE.

XI.—ARGUMENT OF SIR ROUNDELL PALMER ON THE CLAIM OF THE UNITED STATES FOR INTEREST BY WAY OF DAMAGES.

1. The question of the allowance of interest on the sums claimed in respect of their alleged losses by the United States, is one of grave importance, both in principle and in amount. It has not hitherto been discussed, with any precision or fullness, by either party. By Great Britain this demand has been simply demurred to in principle; it was thought premature to enter into any detailed argument on that subject until some liability should have been established, which would properly raise the question. The United States, in their Argument, presented on the 15th of June, have suggested (paragraphs 484–'5) some reasons why, if a gross sum is awarded, "interest" should be "awarded by the Tribunal as an element of the damage;" but these reasons are very short and vague, and no attempt has been made to develop them in such a manner as to be of any real assistance to the Tribunal.

2. It is necessary to bear in mind what it is which the Tribunal has power to do in this matter. Under the seventh Article of the Treaty, on finding that Great Britain has failed to fulfill any of the duties previously mentioned, in respect of any of the vessels, the Tribunal "may, if it think proper, proceed to award a sum in gross to be paid by Great Britain to the United States for all the claims referred to it." If it does not award a sum in gross under this Article, the duty of examining and of ascertaining and determining the validity of all the claims brought forward, and "what amount or amounts shall be paid by Great Britain to the United States on account of the liability as to each vessel, *according to the extent of such liability as decided by the Arbitrators*," will devolve upon Assessors, under the tenth Article.

It may be that the Tribunal has power to decide, if it should think it right and just to do so, that on all or some part of the principal amounts of the losses for which Great Britain may be found liable, when ascertained and determined by Assessors in the manner provided by the tenth Article, Great Britain should further be liable to pay interest at some rate or rates to be fixed, which interest would, in that case, have to be computed by the Assessors, and would be included in the sum or sums finally ascertained and determined by them as payable by Great Britain. But it is indisputable, on the other hand, that, under the ninth Article, the Tribunal has no power to direct any interest to be paid upon any gross sum which they may think fit to award. It is one gross sum only, to be paid in coin within twelve months after the date of the award, which they have power to allow. The Counsel for the United States appear to be sensible of this, when they assume in the passage of their Argument already quoted (page 484) that "interest will be awarded by the Tribunal, *as an element of the damage;*" the meaning of which evidently is, that they ask the Tribunal, when fixing the amount of the gross sum (if any) which they may award to be paid, to take into consideration, and to include in such gross sum, (among other "elements of damage,") some allowance in respect of interest upon the losses for which Great Britain is held responsible.

only the Arbitrators can arrive at any gross sum to be awarded against Great Britain, and to the materials or "elements" available to them for the purposes of such an award, it will be clearly seen that they cannot, without disregarding every principle on which the doctrine of interest ordinarily rests, make any such allowance. Instead of being "conformable to public law," and "required by permanent considerations of equity and justice," this demand can be demonstrated without difficulty to be just the reverse. The proofs, however, of this proposition will be better understood if, in the first instance, we ascertain the rules of civil jurisprudence, applicable to the subject of interest.

4. Putting aside those cases in which the liability of an individual to pay interest rests upon an express or implied contract, or upon positive legislation, it may be stated generally, that interest, in the proper sense of that word, can only be allowed where there is a principal debt, of liquidated and ascertained amount, detained and withheld by the debtor from the creditor after the time when it was absolutely due, and ought to have been paid, the fault of the delay in payment resting with the debtor; or where the debtor has wrongfully taken possession of, and exercised dominion over, the property of the creditor.

In the former case, from the time when the debt ought to have been paid, the debtor has had the use of the creditor's money, and may justly be presumed to have employed it for his own profit and advantage. He has thus made a gain, corresponding with the loss which the creditor has sustained by being deprived during the same period of time of the use of his money; and it is evidently just that he should account to the creditor for the interest, which the law takes as the measure of this reciprocal gain and loss. In the latter case the principle is exactly the same; it is, ordinarily, to be presumed that the person who has wrongfully taken possession of the property of another has enjoyed the fruits of it; and if, instead of this, he has destroyed it, or kept it unproductive, it is still just to hold him responsible for interest on its value, because his own acts, after the time when he assumed control over it, are the causes why it has remained unfruitful.

In all these cases it is the actual or virtual possession of the money or property belonging to another, which is the foundation of the liability to interest. The person liable is either *lucratus* by the detention of what is not his own, or is justly accountable, as if he were so.

5. The rules of the Roman law, as to interest for non-payment of a debt due upon contract, are in strict accordance with the above statement: "In bonæ fidei contractibus, usuræ *ex morâ* debentur." (Digest, lib. 32, § 2; lib. 17, § 3.) "Interest," says Domat, (lib. 3, tit. 5, § 1,) "is the name applied to the compensation which the law gives to the creditor, who is entitled to recover a sum of money *from his debtor in default.*" (Cited in Sedgwick on Damages, page 234.)

The Code Civil of France in like manner (lib. 3, tit. 3, "Contrats et Obligations," Art. 1146) provides that "les dommages et intérêts," (which, in the absence of a stipulated amount between the parties, are limited, by Art. 1153, to the rate of interest fixed by law,) "ne sont dûs que lorsque le débiteur *est en demeure de remplir une obligation ;*" and Art. 1139 defines the meaning of this expression: "Le débiteur est constitué en demeure, soit par une sommation, ou par autre acte équivalent, soit par l'effet de la convention, lorsqu'elle porte que, sans qu'il soit besoin d'acte, et par la seule échéance du terme, le débiteur sera en demeure." The laws of Great Britain and America recognize the same principles.

6. Mr. Sedgwick, an American author, whose work "On the Measure

of Damages" is highly esteemed, and of frequent reference in the courts of Great Britain, as well as in those of the United States, has a chapter (XV) on "*Interest with reference to Damages.*" At page 373 he says:

The allowance or infliction of interest often presents itself entirely disconnected from any question of contract; and, in this aspect, the subject cannot be omitted in any work which treats of compensation, for it is to be observed generally, to use the language of Lord Kenyon, that where interest is intended to be given, it forms part of the damages assessed by the jury, or by those who are substituted in their place by the parties.

The subject of interest is susceptible of very clearly defined division: *first*, where it can be claimed as a right, either because there is an express contract to pay it, or because it is recoverable as damages which the party is legally bound to pay for the detention of money or property improperly withheld; *second*, where it is imposed to punish negligence, tortious, or fraudulent conduct. In the first case it is recoverable as matter of law. In the second case it rests entirely in the pleasure of the jury.

He then states the rules of the English law, that "all contracts to pay undoubtedly give a right to interest *from the time when the principal ought to be paid;*" and that "where money is due, *without any definite time of payment*, and there is no contract, express or implied, that interest shall be paid, the English rule, independent of statute, is, that it cannot be claimed."[1]

This latter rule does not appear to be adopted in the greater number of the United States.

"There is," says Mr. Sedgwick, "considerable conflict and contradiction between the English and American cases on this subject. But, as a general thing, it may be said that while the tribunals of the former country restrict themselves generally to those cases where an agreement to pay interest can be proved or inferred, the courts of the United States, on the other hand, have shown themselves more liberally disposed, *making the allowance of interest more nearly to depend upon the equity of the case*, and not requiring an express or implied promise to sustain the claim. The leading difference seems to grow out of a different consideration of the nature of the money. *The American cases look upon the interest as the necessary incident, the natural growth, of the money, and, therefore, incline to give it with the principal;* while the English treat it as something distinct and independent, and only to be had by virtue of some positive agreement."[2]

The American rules for the application of the principles recognized in their courts were thus stated by the Chief Justice of New York, in a case in which the whole subject was carefully examined:

From an examination of the cases, it seems that interest is allowed: (1) Upon a special agreement; (2) Upon an implied promise to pay it; and this may arise from usage between the parties or usage of a particular trade; (3) *When money is withheld against the will of the owner;* (4) By way of punishment, *for any illegal conversion or use of another's property;* (5) Upon advances of money.[3]

In Connecticut, similar propositions were laid down:

(1) Interest will be allowed, when there is an express contract to pay it; (2) Such contract may be inferred from usage, special or general; (3) *Where there is a contract to pay money on a day certain, and the agreement is broken*, interest will be allowed by *way of damages*, as on notes, &c.; (4) When goods are sold, to be paid for on a day certain, interest, in like manner, follows; (5) *Where money is received for the use of another, and there is neglect in not paying it, interest follows;* (6) *Where money is obtained by fraud*, interest is allowed; (7) *Where an account is liquidated and balance ascertained, interest begins to run;* (8) *Where goods* are delivered to be paid for, not at a day certain, but in a reasonable time, and there is unreasonable delay, interest is allowed; (9) But where there are current accounts, founded on mutual dealings, and no promise to pay interest, interest will not be allowed.[4]

With respect to the fraudulent detention of money, the rule acted upon as to interest by the courts of America generally is the same with that which now prevails in the English courts of equity. "Where money

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[1] "On the Measure of Damages," p. 376.

[2] Page 380.

[3] Page 380.

own use, he must pay interest." (P. 378.)

In all these cases, the money must be actually due, and the amount liquidated, that is, ascertained and fixed, or capable of being ascertained by a mere process of computation resulting from known facts, of which actual indebtedness is the legal consequence. With respect to claims for interest on *unliquidated* demands, the law of Great Britain and of the United States is the same.

"It is a general rule," says Mr. Sedgwick, p. 377, "that *interest is not recoverable on unliquidated demands.* In an action for not delivering teas according to agreement, Judge Washington, at Nisi Prius, said, '*It is not agreeable to legal principles to allow interest on unliquidated or contested claims in damages.*' 'The rule is well-established,' says Judge Parker, in the Supreme Court of New York, 'that interest is not recoverable on running or unliquidated accounts, unless there is an agreement, either express or implied, to pay interest.' So in Massachusetts, it is said, that 'interest cannot be recovered upon an open and running account for work and labor, goods sold, and the like, unless there is some contract to pay interest, or some usage, as in the case of the custom of merchants, from which a contract may be inferred.' And so also, in Texas, interest is denied on an open account. *So, in an action on a policy of insurance, if the preliminary proofs are so vague that the claim cannot be computed, interest is not allowable.*"

At pages 385–387, Mr. Sedgwick considers another class of cases, under the head of "*interest, when given as damages,*" *i. e.*, those in which it is not given properly "*as interest,*" under the control of the Court, and "allowed or disallowed upon certain rules of law;" but "where it is to be settled by the verdict of a jury," and "given more strictly as damages."

The cases in which this rule is applied are generally those in which the property of the plaintiff has been wrongfully taken possession of by the defendant:

This is generally so in actions of tort, as trover or trespass for taking goods, where interest is allowed at the discretion of the jury. So in an action of trespass, the Supreme Court of New York said: "The plaintiff ought not to be deprived of his property for years without compensation for the loss of the use of it; and the jury had a discretion to allow interest in this case as damages. It has been allowed in actions of trover, and the same rule applies to *trespass when brought for the recovery of property.*" So in Kentucky, in case of a fraudulent refusal to convey land; and so declared also in North Carolina in cases of trover and trespass.[1]

It is to be observed that the action of "trover" here mentioned is a form of remedy under American and English law for the conversion by a defendant to his own use of the plaintiff's property; and the action of "trespass" is another form of remedy, under the same laws, when a defendant has intruded, without right, upon the property of the plaintiff. In all the cases here contemplated the liability to be mulcted in interest as damages arises out of the exclusion of the owner from the enjoyment of his own property, by the direct act of the person from whom the damages are recovered, and who, by reason thereof, has himself enjoyed (or, but for his own willful default, might have enjoyed) that benefit of the property from which the owner has been so excluded. The principle on which a jury ought to proceed in giving or not giving interest by way of damages was thus explained by the Court of New York: "In two actions against a master of a ship for non-delivery of goods, it was held in New York that the jury might give damages *if the conduct of the defendant was improper; i. e., where fraud or gross misconduct could be imputed to him;* but it appearing that such was not the fact, it was not allowed."[1]

The principle thus thus laid down is in strict conformity with that

[1] Page 386.

stated in another American treatise of reputation upon the "Law of Negligence," by Messrs. Shearman and Redfield:

§ 600. Exemplary, vindictive, or punitive damages can never be recovered in actions upon anything less than *gross negligence*. Of this there can be no doubt. * * * It is often said that exemplary damages may be awarded for gross negligence. But it should be distinctly understood that *gross negligence means such entire want of care as to raise a presumption that the person in fault is conscious of the probable consequences of his carelessness, and is indifferent, or worse, to the danger of injury to the persons or property of others;* and such appears to us to be the construction put upon these words by the Courts, in the cases referred to. *It is only in cases of such recklessness* that, in our opinion, exemplary damages should be allowed.

7. Let us now, with these principles of general jurisprudence in view, examine the circumstances of the present case, in order to see whether they present any just and equitable grounds or any sufficient materials on which interest by way of damages can be included by the Tribunal in any gross sum which they may think proper to award against Great Britain.

8. In the first place, this is not the case of a detention or delay in the payment of a liquidated debt or ascertained liability payable at a period which has elapsed; there was, in fact, no liability at all independently of the exercise of the judgment of Arbitrators upon a very novel, entangled, and difficult state of facts and public law. The claims made by the United States extended to many matters for which the Arbitrators have found Great Britain not responsible. The decisions of the Arbitrators against Great Britain have been mainly founded upon the conventional rules of judgment first introduced as between the two nations by the Treaty of 1871, though agreed by that Treaty to be retrospectively applied; and there are, down to this moment, no means of ascertaining, by any method of computation whatever, the actual amount of the liability properly resulting from those decisions.

9. The observations of Professor Bluntschli, in his paper on these claims, ("Revue de Droit International," 1870, p. 474,) are material in this respect:

"À en croire," he says, "plusieurs orateurs et écrivains américains, il irait de soi que le gouvernement de la Grande-Bretagne serait obligé de dédommager au moins les particuliers, dont la propriété aurait été détruite par l'Alabama, (ainsi que par la Florida, ou d'autres corsaires susdits.) À mon avis, ce point est loin d'être entièrement évident, et l'on pourrait singulièrement se tromper, en se fiant trop au succès réservé à ces réclamations privées devant un tribunal arbitral. Si l'union ne prend pas, comme état, ces réclamations privées sous sa protection, et si elle ne fait pas consister dans leur équitable apaisement la satisfaction que les États-Unis ont droit de réclamer de la Grande-Bretagne, dans ce cas, les particuliers intéressés n'ont absolument aucune perspective de dédommagement. D'après les règles du droit privé ordinaire, leurs prétentions seraient tout-à-fait vaines. Nulle part ils ne trouveraient un juge qui condamnerait le gouvernement anglais à payer une indemnité. * * * D'après les observations qui précédent, tout le débat se résume, non pas en un litige entre des particuliers auxquels la guerre a causé des pertes, et l'état de la Grande-Bretagne que l'on veut rendre responsable de celles-ci, mais en un litige entre la fédération des États-Unis d'un côté et la Grande-Bretagne. *Et ce qui fait l'objet du litige, ce n'est pas un dommage matériel, mais la non-observation des devoirs internationaux de la part d'un état ami et neutre.*

As there was no liability which could properly be called a debt, or in respect of which any interest could be due upon juridical principles, so (on the other hand) there was no property belonging to the United States or their citizens, of which possession was at any time taken, or any enjoyment whatever had, by Great Britain, her officers, or her citizens, or by any persons under British protection, availing themselves of that protection to maintain such possession or enjoyment. The words of Professor Blüntschli, already quoted in a former argument, are here again material:

Il ne faut, d'ailleurs, pas perdre de vue que tous ces effets désastreux sont en premier lieu imputables, non pas au gouvernement anglais, mais aux *croiseurs* eux-mêmes. Personne n'accusera le gouvernement anglais d'avoir donné mission de détruire les navires de commerce américains, ou d'avoir, par ses agissements, entravé ou endommagé la marine américaine. Ce que l'on peut lui reprocher à bon droit, (en supposant que les faits cités plus haut doivent être considérs comme avoués ou prouvés,) ce n'est pas un *fait*, mais une *omission contre le droit*. Sa faute ne consiste pas à avoir équipé et appareillé les corsaires, mais à *n'avoir pas empêché* leur armement et leur sortie de son territoire neutre. Mais cette *faute* n'a qu'un rapport *indirect*, et nullement un rapport *direct*, avec les déprédations réellement commises par les croiseurs.[1]

Great Britain did not make or authorize the captures by which the citizens of the United States lost their property; they were never brought within her territory, so as to make her answerable for them on the principle of reception; nor had she, or her citizens, at any time, any profit or benefit whatever, or any possibility of deriving profit or benefit from any of them. Nor is it supposed to be possible that the Tribunal can be led to attribute any want of diligence, with which, in certain cases, Great Britain may in their view be chargeable, to any such motives or causes as, according to the analogy of private jurisprudence, would justify a jury or an Arbitrator in giving vindictive or penal damages. Every ground, therefore, on which (according to juridical principles) interest could be awarded as an element of damages, is wanting here.

11. Furthermore, independently of the facts affecting the nature and amount of the claims themselves, which will be hereafter referred to, there are other special considerations which, in the present case, appear to make it the duty of the Arbitrators, if they find Great Britain responsible at all in damages to the United States, to mitigate, in the exercise of a reasonable discretion, the amount of those damages; and certainly not to inflame or aggravate them by the addition of penal interest.

If the following arguments in the British Counter Case (p. 132) are held insufficient to exonerate Great Britain from all liability, they must at least be admitted to be of great weight and pertinence, as against any attempt to push the doctrine of compensation and indemnity, in this case, to an extreme length:

The whole responsibility of the acts which caused these losses, belonged, primarily, to the Confederate States; they were all done by them, beyond the jurisdiction and control of Great Britain; wrong was done by them to Great Britain, in the very infraction of her laws, which constitutes the foundation of the present claims. But from them, no pecuniary reparation whatever for these losses has been, or is now, exacted by the conquerors; what has been condoned to the principals, is sought to be exacted from those who were, at the most, passively accessory to those losses, through a wrong done to them, and against their will. The very States which did the wrong are part of the United States, who now seek to throw the pecuniary liability for that wrong solely and exclusively upon Great Britain, herself (as far, at least, as they are concerned) the injured party. They have been re-admitted to their former full participation in the rights and privileges of the Federal Constitution; they send their members to the Senate and the House of Representatives; they take part in the election of the President; they would share in any benefit which the public revenue of the United States might derive from whatever might be awarded by the Arbitrators to be paid by Great Britain. On what principle of international equity can a Federal Commonwealth, so composed, seek to throw upon a neutral, assumed at the most to have been guilty of some degree of negligence, liabilities which belonged in the first degree to its own citizens, with whom it has now re-entered into relations of political unity, and from which it has wholly absolved those citizens?

The American Union is not a single Republic, but is a Federation of States. The eleven States which joined the Southern Confederacy are also now joining in the present claims. Upon ordinary principles of

[1] Page 473. The italics in this passage are in the original text.

justice, if Great Britain is held responsible for those claims, she would herself have a claim for indemnity against those eleven States; which, in their external relations toward herself and other countries, are represented by the Federal Government. If everything has been condoned to them by the Federal Government, and if their relations to that Government preclude Great Britain from having recourse to them for the indemnity which would otherwise be justly due to her, it is surely impossible to conceive a case in which there would be less justification for a discretionary and penal augmentation of damages, such as an allowance in respect of interest, in a proceeding for unliquidated damages, always is.

Another argument, arising from the peculiar circumstances of the present case, and which has also a strong bearing in favor of a reasonable modification of the liability of Great Britain, and, at all events, against any aggravation of that liability by the addition of interest as an element of damages, is thus stated in the British Counter Case, (p. 132:)

> When any vessels, whether procured from Great Britain, or otherwise obtained, had become Confederate ships of war, the duty of repelling their hostile proceedings by all proper and efficient means (like the rest of the operations necessary for the conduct of the war) devolved exclusively upon the United States, and not upon the British Government. Over the measures taken by the United States for that purpose, Great Britain could exercise no influence or control; nor can she be held responsible in any degree for their delay, their neglect, or their insufficiency. Any want of skill or success, even in the operations by land, would have the effect of prolonging the period during which cruises of this nature could be continued. All losses, which might have been prevented by the use of more skillful or more energetic means, ought justly to be ascribed to a want of due diligence on the part of the Government of the United States, and not to any error, at any earlier stage, of the British Government. *Causa proxima, non remota spectatur.*

In support of this reasoning, various facts are referred to, at pages 138–140 of the same Counter Case, which show that numerous opportunities of arresting the progress of the Confederate cruisers were actually lost, through the remissness or fault (according to the judgment of their own official superiors) of the officers who ought to have performed that duty; and that the means employed by the Government of the United States for that object were on the whole inadequate for its energetic accomplishment. It would surely be of very dangerous example to hold that a belligerent power is at liberty (upon such an occurrence, *e. g.*, as the enlistment of forty men of the Shenandoah on the night of her leaving Melbourne) to leave a vessel which has abused the hospitality of a neutral State, to harass the commerce of its citizens without the use of efficient means of prevention; relying upon an eventual pecuniary claim against the neutral State for the value of all the subsequent captures of that vessel, with interest to the day of payment.

12. Even if it were possible that interest could be held due, on account of delay of payment, in a case of unliquidated and unascertained claims of this nature, between nation and nation, it is obvious that the United States, and not Great Britain, are exclusively responsible for so much, at least, of the delay, as has been due to the rejection by the Senate of the United States of the Convention signed by Mr. Reverdy Johnson and the Earl of Clarendon, on the 14th January, 1869. (British Appendix, vol. iv, part 9, pp. 36–38.) That Convention provided for a reference to arbitration of all the claims of American citizens, arising out of the acts of the several vessels to which the present controversy relates.

It was the result of a careful negotiation, expressly authorized from the beginning to the end by the Government of the United States. Its

form was several times altered to meet suggestions proceeding from that Government; and no such suggestion was made, before the final signature, which was not met by a practical concession on the part of Great Britain. If that Convention had been ratified in 1869, a settlement of all these claims would have taken place either three or, at least, two years since. It was, however, rejected by the Senate of the United States without so much as the communication, at the time, of any reason or explanation whatever to the British Government. (British Appendix, vol. iv, part 9, page 10, *ad finem.*) No reason or explanation has ever been offered which can alter the significance of this fact, or make it reconcilable with any conceivable view of justice, that, as against a Government which has never derived any profit or benefit, either directly or through its citizens, from any of the captures in question, the United States should claim interest for a delay due only to themselves. Great Britain, from the commencement of the negotiations between Lord Stanley and Mr. Reverdy Johnson in 1866, was always willing that these claims should be settled by arbitration; the difficulty (which appears to have originated in the suggestion by Mr. Sumner of those indirect claims, which are now excluded from the consideration of the Tribunal) was on the part of the United States alone. Can it be said that, if the delay, so caused, had lasted for twenty or for ten years, a claim by the United States for interest during that period could still have been maintained? If not, it cannot be maintained now; whether the delay is twenty years or two years, can make no difference in principle.

13. All the foregoing reasons belong to the general equity of the case, and are independent of all the objections to the allowance of interest as an element of damages or compensation, which arise out of the particulars of the claims, and the impossibility of ascertaining or defining them before this Tribunal.

14. The substantial claims (setting aside that of the United States for the alleged expenses of pursuit and capture) are those of the owners of ships and other property destroyed, and those of the insurance companies with whom the property lost was insured. The amount of both these classes of claims is stated in dollars of the currency of the United States at the respective times when the losses were sustained and the insurances paid. The value of the dollar currency was, during that whole period, enormously depreciated by reason of the war and of the suspension of specie payments in the United States. Its exchangeable value, as compared with the exchangeable value of the dollar in gold, during the period of specie payments before the war and also at the present time, was as 5,614 to 7,744, or, in round numbers, as 8 to 11.[1]

All values of property computed in dollars of the forced paper currency, during that period, stood at proportionally higher figures than they would have done during the time of specie payments. The payment of all these claims,[2] so stated at their values in a forced paper currency, is now sought to be recovered against Great Britain at the nominal value of the same number of dollars converted into gold at the present rate of exchange; thus giving to every claimant *a direct gain of above 27 per cent.*, by the difference only between the value of the dollar in which the losses were estimated, and the value of the dollar in which the payment is asked to be made. This gain is alone equivalent to the actual addition of interest, at the rate of 6 per cent. per annum, for four years and a half upon every claim.

15. With respect to the insurance companies, it must be remembered

[1] British Summary, p.68.

[2] The exceptions are few, and of no importance to the argument.

that, as against the losses which they paid, they received the benefit of the enormous war-premiums which ruled at that time; and that these were the risks against which they indemnified themselves (and, it cannot be doubted, so as make their business profitable upon the whole) by those extraordinary premiums. Would it be equitable now to reimburse them, not only the amount of all these losses, *but interest* thereon, without taking into account any part of the profits which they so received?

16. These remarks would hold good if an exact valuation of the claims were possible; but, before this Tribunal, neither an exact valuation of any part of these claims, nor any approximation to such a valuation, is possible. This consideration alone ought to be decisive against the demand of interest, as an element of damages, in any gross sum to be awarded by the Tribunal.

When this is held to be admissible in private jurisprudence, the estimate or computation of the amount to be added for interest is always founded upon some appropriate evidence, by which the Jury or the Court is enabled to fix a definite sum as the value of the principal subject for which compensation is due. Before interest can be computed, whether as a legal incident of a liquidated debt, or as an element in damages previously unliquidated, the principal sum must be known; and this, not by conjecture, not by accepting, without proof in detail, the amount at which the interested party may choose to state his own claim, (almost always excessive and exorbitant, and, as a general rule, purposely so overstated, in order to leave a very wide margin for a profit after all probable deductions,) nor by any merely arbitrary modification of that amount, but by such vouchers and proofs as, after the opposite party has had the opportunity of seeing and checking them, are deemed satisfactory. Where such vouchers and proofs are absent, or cannot be satisfactorily tested, all foundation for an allowance of interest, as an element of damages, necessarily fails.

17. In the present case, not only is it altogether impossible to ascertain, either accurately or proximately, any sum which can be taken by the Tribunal as representing the principal amount of the losses, for which Great Britain ought to be held responsible; but the figures which have been laid before the Tribunal on both sides show in a very significant manner what great injustice might be inadvertently done, and how largely any just measure of compensation or indemnity might be exceeded, if the Tribunal were either to assume some amount, arbitrarily fixed, as representing the principal of those losses, and then to add interest on that amount; or were, without any such attempt at exactness, to swell, by some undefined and arbitrary addition under the notion of providing for interest, an award for a gross sum, founded on no distinct elements admitting of any computation. It does not require much attention to the particulars of the claims to see that they have been intentionally so stated, as to leave not only a wide margin for all those deductions, which the criticism of Great Britain might prove to be necessary, but ample room, after every such deduction has been made, for a large and full compensation and indemnity, without any further addition whatever. The British criticisms cannot and do not attempt more than to cut off manifest exaggerations of those claims, either by demonstrating the inadmissibility in principle of some of them, (*e. g.*, the double claims, and the prospective earnings,) or by showing that others (*e. g.*, the claim for gross freights) must, on principle, be reduced by manifestly necessary deductions, or by appealing to the known and ascertained values of shipping, &c., of the same classes before the

war, as a standard of comparison to which estimates of losses, manifestly excessive, may be referred. But when the fullest effect has been given to all these criticisms, the remaining claims continue unvouched and untested, under circumstances in which every really doubtful and uncertain question of actual value is practically taken for granted, even by the reduced British estimate, in the claimant's favor.

18. In illustration and proof of the preceding observations, the following important extract from the Report of Messrs. Cohen and Young, appended to the British Argument or Summary, (pp. 46–47,) containing matters, not of opinion, but of fact, which the Arbitrators may verify for themselves merely by referring to the several documents in which the claims of the United States have been at different times stated, is here subjoined:

"It will be useful," they say, "to make some observations which present themselves on comparing, with the 'Revised Statement,' the original list of claims which was sent by Mr. Seward to Mr. Adams in August, 1866, and also the extension of this, as presented by the President to the House of Representatives in April, 1869, and which are to be found in the fourth volume of 'The Correspondence concerning Claims against Great Britain transmitted to the Senate of the United States.'

"These lists of claims not only strongly confirm the opinion we expressed in our First Report, that the estimate we there made of the value of the vessels was probably a very liberal one, but also show in a remarkable manner how, since the year 1866, the claimants have in most cases enormously increased their estimate of the losses alleged to have been sustained by them.

"We will cite some of the more striking instances—calling the list of claims sent to Mr. Adams the 'Original List,' the List presented to the House of Representatives the 'United States Amended List,' the Statement,[1] on which we have already reported, the 'Former Statement,' and the Revised List of Claims[2] on which we are now reporting the 'Revised Statement.'

"*The Alert.*—The claim as stated in the 'Original List' amounted to $57,859; in the 'Revised Statement' (p. 1) it amounts to $202,726. In the 'Original List' there was a claim of $30,000 for '*interruption of voyage;*' but now, in addition to that amount, there is claimed a sum of $144,869 for '*prospective earnings.*'

"*The Anna Schmidt.*—This vessel was in the 'Original List' valued at $30,000, which is somewhat less than the average valuation we have allowed in proportion to her tonnage, but in the 'Revised Statement' (p. 13) the sum claimed in respect of the *vessel* is double that amount.

"*The Golden Eagle.*—In the 'Original List' the owners claimed for the *vessel* $36,000, and for *freight* $26,000. Our average estimate in proportion to her tonnage was about $45,000. In the 'Revised Statement' (p. 40) the owners claim $86,000 for *vessel and freight*, thus increasing their claim by nearly 50 per cent.

"*The Highlander.*—She was a vessel of 1,049 tons, and was in ballast. In the 'Original List' two insurance companies advanced claims for insurances to the extent of $30,000, which was probably about the value of the vessel; but in the 'Revised Statement' (p. 46) the owners put forward an additional claim for the ship to the extent of $84,000 This claim is, however, far less extravagant than the claim for freight, which in the 'Original List' amounted to $6,000; whereas in the 'Revised Statement' it exceeds $68,000, and is advanced without any deduction whatever, although the ship was in ballast at the time of her capture. It will be found that at pages 6 and 27 of our First Report we have specially commented on the character and extent of the extraordinary demands put forward in respect of this vessel.

"*The Ocean Rover.*—In the 'Original List' the owners claimed $10,400 for *value of ship, loss of oil on board, and damages for breaking up of voyage.* The claims now advanced in the 'Revised Statement' (p. 68) in respect of the same losses exceed $193,000, the difference between the original claim and the more recent one being made up entirely of '*double claims for single losses.*'

"*The Kate Cory.*—In the 'Original List' the owners claimed $27,800 for the value of *the brig, outfit, and oil on board*, and there was also a claim of $1,820 for the value of 'reasonable prospective catch of oil.' In the 'Revised Statement' (p. 51) the amounts insured have, as usual, been added to the claims by the owners, and there has been inserted a claim of $19,293 for loss of *prospective catch*, so that the original claim for $29,620 has grown to $56,474.

"*The Lafayette No. 2.*—In the 'Original List' the owners valued the ship and outfit

[1] Presented with the American Case, on December 15. 1871.
[2] Presented with the American Counter Case, on April 15, 1872.

at $24,000, which is less than our average valuation according to her tonnage; and the secured earnings at $10,475; but in the 'Revised Statement' (p. 55) the claim put forward in respect of *ship and outfit and secured earnings* is more than $89,000; and the *prospective earnings*, which were in the 'Original List' valued at $33,446, are now estimated at a sum exceeding $50,000. The original claim for $69,471 has grown to $141,858.

"*The Rockingham.*—The claim in the 'Original List' amounted to $105,000, whereas the claim in the 'Revised Statement' (p. 74) exceeds $225,000. This is also one of the vessels which we selected in our First Report (page 23) as a striking example of the exorbitant nature of some of the claims. There can be no doubt that the original claim was very extravagant, but in the 'Revised Statement' it has been doubled by improperly adding the insurances to the alleged values.

The Union Jack.—In the "Original List" it is stated that G. Potter, *after deducting the amount* received from the Atlantic Insurance Company, claims the sum of $7,584; but in the "Revised Statement" (p. 111) he claims the sum of $34,526, *without making any deduction* for insurances, although the insurance companies at the same time claim $32,014 in respect of the amount insured by them; and it therefore clearly follows that a sum, at any rate exceeding $26,000, is claimed twice over.

The Catherine.—In the "Original List" the owners claimed about $45,000 for *vessels and secured earnings*, but made no claim in respect of *prospective earnings*. Now, in the "Revised Statement," (p. 229,) there is a claim put forward of $35,329 for loss of *vessel and cargo*, over and above $31,676, the alleged amount of insurances by the owners, which is also at the same time claimed by the insurance company. In addition to this there is a claim for *prospective earnings* exceeding $19,600, so that the original claim of $45,805 has now grown to the enormous sum of $272,108.

The Favourite.—She was a bark of 393 tons. In the "Original List" the Atlantic Insurance Company, as insurers and assignees of the owners, claimed for loss on *vessel and outfit* $40,000, which there can be little doubt was the full value. In the "Revised Statement" (p. 240) the claims in respect of the *vessel and outfit* amount altogether to $110,000. The master, in the "Original List," claimed $1,498 for the *loss of his effects;* but now he claims for the *loss of his personal property*, $2,239, and *for loss of interest in oil and bone*, $2,709.

The Isaac Howland.—In the "Original List" the claim for *prospective earnings* was $53,075, but in the "Revised Statement" (p. 247) it has grown to nearly four times that sum, namely, to $196,158. Moreover, in the "Original List," the owners claimed $65,000 for ship and outfit, *subject to abatement for insurance;* whereas, in the "Revised Statement," they claim the same sum, but *protest against any diminution of claim by reason of insurance obtained by them*, although the insurance companies claim at the same time the whole amount insured by them.

The General Williams.—In the "Original List" the owners claimed $40,503 as *damages by the destruction of the vessel*, over and above $44,673, the amount of insurances received by them. In the "Revised Statement" (p. 241) there is added to the amount of insurances a sum of $85,177, the claim being in this manner all but doubled. There are also added the following claims: A claim by the owners for *prospective earnings* amounting to $196,807; a claim by the master for loss of *prospective catch, time, and occupation*, amounting to $20,000; a similar claim by the mate, amounting to $10,000; another claim of $30,000 for *insurances on vessel and outfit;* and finally, the sum of $16,000 for *insurances by the owners on the vessel's prospective earnings*. In this manner the original claim, which was less than $66,000, has grown to the sum of $406,934, and has therefore been increased more than sixfold.

19. One more subject remains to be dealt with. The United States, in their Argument, (page 220,) have appealed to certain historical precedents. After stating, in a passage already referred to, (and to which, it is hoped, a full and sufficient reply has been made,) that they conceive this demand of interest, as an element of damage, to be "conformable to public law, and to be required by paramount considerations of equity and justice," they add:

Numerous examples of this occur in matters of international valuation and indemnity.

Thus, on a recent occasion, in the disposition of Sir Edward Thornton, British Minister at Washington, as Umpire of a claim on the part of the United States against Brazil, the Umpire decided that the claimants were entitled to interest by the same right which entitled them to reparation. And the interest allowed in this case was (45,077 dollars) nearly half of the entire award, (100,740 dollars.)

So, in the case of an award of damages by the Emperor of Russia in a claim of the United States against Great Britain under the Treaty of Ghent, additional damages were awarded in the nature of damages from the time when the indemnity was due.

In that case, Mr. Wirt holds that, according to the usage of nations, interest is due on international transactions.

In like manner Sir John Nicholl, British Commissioner in the adjustment of damage between the United States and Great Britain under the Jay Treaty, awards interest, and says:

To re-imburse to claimants the original cost of their property, and all the expenses they have actually incurred, *together with interest on the whole amount*, would, I think, be a just and adequate compensation. This, I believe, is the measure of compensation usually made by all belligerent nations for losses, costs, and damages occasioned by illegal captures.

20. There can be no greater fallacy, and there is also none more familiar to the practical experience of jurists, than this kind of general reference to precedents, which, when the facts are examined, are found to differ from the case to which they are sought to be applied, in all or some of the most essential points, upon which the question in controversy depends.

Let us now examine these "examples" in their proper historical order, which has been inverted in the Argument of the United States.

21. The earliest in date is that of the claims under the "Jay Treaty," *i. e.*, the Treaty between Great Britain and the United States, signed at London, on the 19th November, 1794. That Treaty contained two Articles applicable to different descriptions of claims. The sixth Article was in these terms:

Whereas it is alleged by divers British merchants and others, His Majesty's subjects, that *debts to a considerable amount, which were bonâ fide contracted before the peace, still remain owing to them by citizens or inhabitants of the United States*, and that, by the operation of various lawful impediments since the peace, *not only the full recovery of the said debts has been delayed*, but also the value and security thereof have been, in several instances, impaired and lessened, *so that, by the ordinary course of judicial proceedings, the British creditors cannot now obtain, and actually have and receive, full and adequate compensation for the losses and damages which they have thereby sustained;* it is agreed that, in all such cases where full compensation for such losses and damages cannot, for whatever reasons, be actually obtained, had, and received by the creditors, in the ordinary course of justice, *the United States will make full and complete compensation for the same to the said creditors;* but it is distinctly understood that this provision is to extend to such losses only as have been occasioned by the lawful impediments aforesaid, and is not to extend to losses occasioned by such insolvency of the debtors or other causes as would equally have operated to produce such loss if the said impediments had not existed, nor to such losses or damages as have been occasioned by the manifest delay or negligence, or willful omission, of the claimant.

This Article having relation to *debts actually and bonâ fide due and payable* by American to British subjects, and of which the payment had been delayed and prevented by legal impediments opposed to the recovery of such debts by the policy and legislation of the Government of the United States, it is apparent not only that the claims, being liquidated, admitted of the computation of interest upon them in the most proper sense of that word, but also that they were such as entitled the claimants to interest upon the strictest principles of private jurisprudence, which here necessarily furnished the rule, the responsibility for these private debts being expressly assumed, on grounds of public policy, by the Government of the United States. The British Commissioners, under this Article (being a majority) accordingly decided, in the case of Messrs. Cunningham & Co., (18th of December, 1798,) that interest ought to be awarded "for the detention and delay of payment of these debts during the war as well as in time of peace, according to the nature and import, express or implied, of the several contracts on which the claims were founded." From this decision the American Commissioners, Messrs. Fitzsimons and Sitgreaves, on the 21st December, 1798, recorded their dissent, their objections being most strongly urged with reference to the allowance of interest during the time of

war; and, on the 11th January, 1799, they followed up this dissent, and another protest made by them, in a different case, by withdrawing from the Board and altogether suspending the proceedings of the Commissioners on that description of claims.

22. The seventh Article of the same Treaty provided for the settlement, by Commissioners, of two other classes of claims. The first class consisted of claims by citizens of the United States:

> Whereas complaints have been made by divers merchants and others, citizens of the United States, that, during the course of the war in which His Majesty is now engaged, they have sustained considerable losses and damage, *by reason of irregular or illegal captures or condemnations of their vessels and other property, under color of authority or commissions from His Majesty;* and that, from various circumstances belonging to the said cases, adequate compensation for the losses and damages sustained cannot now be actually obtained, had, and received, by the ordinary course of judicial proceedings: it is agreed that, in all such cases where adequate compensation cannot, for whatever reason, be now actually obtained, had, and received by the said merchants and others in the ordinary course of justice, full and complete compensation for the same will be made by the British Government to the said complainants. But it is distinctly understood that this provision is not to extend to such losses or damages as have been occasioned by the manifest delay or negligence, or willful omission of the claimants.

The Commissioners appointed "for the purpose of ascertaining the amount of any such losses and damages" were to "decide the claims in question according to the merits of the several cases, and to justice, equity, and the laws of nations." Sir John Nicholl was one of those Commissioners, and he concurred (on the grounds stated in the Argument of the United States) in awarding interest on the ascertained amount of "the original cost of the property of the claimants," and "all the expenses which they had actually incurred." This, again, was a case of the award of interest on a principal value, actually ascertained and proved to be recoverable by appropriate evidence, in respect of property, belonging to citizens of the United States, which had been seized and appropriated, and unjustly detained, and (in some cases) sold or otherwise disposed of for their own benefit, by persons acting under the public authority of the Crown of Great Britain. In both these essential points this precedent of 1794 stands in direct opposition and contrast to the claims now before the present Tribunal.

23. The second class of claims, under the seventh Article of the Treaty of 1794, consisted of claims of British subjects who complained "that, in the course of the war, they had sustained loss and damage by *reason of the capture of their vessels and merchandise taken within the limits and jurisdiction of the United States, and brought into the ports of the same, or taken by vessels originally armed in ports of the said States.*"

As to these vessels, the Government of the United States entered into an engagement (by Mr. Jefferson's letter to Mr. Hammond of September 5, 1793) with the British Government, to "use all the means in their power" for the restitution of *such of them (and such only) as had been brought into ports of the United States after the 5th of June*, 1793, on which day M. Genêt, the French Minister, received notice from the President of the United States that he was prohibited from bringing in such prizes; a promise being added that compensation should be made for some particular vessels acknowledged to be within that category, as to which Mr. Jefferson expressly admitted that "for particular reasons" his Government had "forborne to use all the means in their power for their restitution;" and in like manner for any others, as to which they might subsequently think fit to exercise a similar forbearance.

The Commissioners, under this part of the Article, refused all compensation to the owners of British vessels taken by French ships of war or privateers originally armed in ports of the United States, which were

either brought by the captors into American waters before the 5th of June, 1793, or were destroyed at sea, and never brought at all into ports of the United States. As to the other cases, in which compensation was given, it does not appear, from any materials accessible to the Counsel of Her Britannic Majesty, whether interest upon the ascertained value of any British prizes brought into ports of the United States after the 5th of June, 1793, and not restored pursuant to Mr. Jefferson's letter, was, or was not, awarded. Assuming such interest to have been awarded, the reason is obvious. The values of these prizes were ascertained and determined by the Commissioners upon appropriate evidence; and the interest (if any) was calculated upon those ascertained amounts. The engagement of the Government of the United States had made the amounts so ascertained *debts directly due to Great Britain by the United States upon the footing of an express contract*, from the moment at which the prizes, being within the power of the United States, ought to have been restored according to the terms of Mr. Jefferson's letter, but were, "for particular reasons," purposely allowed by the United States' Government to remain in the hands of the captors. This was strictly a case of a debt due and of a willful delay and default in payment; according, therefore, to ordinary juridicial principles, it was right that it should be recovered with interest.

24. The next in order of the historical precedents is that of the claims under the Treaty of Ghent. The following is the history of that case:

During the war between Great Britain and the United States, in 1812–'13, the British forces took possession of certain private property (principally slaves) of American citizens. The first article of the Treaty of Ghent (1814) contained a positive engagement by Great Britain for the restitution of "slaves, or other private property," so taken, which might remain in British possession at the time of the exchange of the ratifications of the Treaty. "In violation of this Treaty, the slaves and other property of American citizens," says Mr. Wirt, the American Attorney-General, in his opinion of May, 1826, now quoted by the United States, "were carried away in the year 1815, and have been detained from them ever since. They have thus lost the use of this property for eleven years."[1] In October, 1818, differences having arisen between the two countries on this subject, a Supplemental Treaty was signed in London, by the 5th Article of which, after stating that "the United States claim for their citizens, and as their private property, the restitution of, or full compensation for, all slaves, &c.," it was referred to the Emperor of Russia to decide between the parties, "whether, by the true intent and meaning of the aforesaid article (*i. e.*, Article I of the Treaty of Ghent) the United States are entitled to the restitution of, or full compensation for, all or any slaves as above described." The Emperor of Russia made his award, deciding that the United States were "*entitled to a full and just indemnification for the slaves and other property carried away by the British forces, in violation of the Treaty of Ghent.*"[2]

A convention was afterward (July, 1822) signed between the United States and Great Britain at St. Petersburgh, under which commissioners of claims were appointed for the purpose of carrying the award of the Emperor into effect.

Under this Convention, the British and American Commissioners disa-

[1] Opinions of the Attorneys-General of the United States, vol. ii, p. 32.

[2] The statement of the United States that the Emperor awarded either "damages" or "additional damages in the nature of damages from the time when the indemnity was due" is entirely erroneous. The reference to the Emperor was only to determine a disputed question on the construction of the Treaty of Ghent.

greed upon the question, whether interest ought or ought not to be allowed upon the ascertained value of the slaves, from the time when they were taken away in the manner which the Emperor of Russia had determined to be a violation of the Treaty of Ghent. These conflicting views of the Commissioners were supported on each side by the law officers of their respective governments. Mr. Wirt, the American Attorney-General, insisted "that interest at least was a necessary part of the indemnity awarded by the Emperor;" that, "without it, a just indemnification could not be made." "The first *act of dispossession* being thus established to be a wrong, is the continuance of it," he asked, "*of that* dispossession for eleven years, no wrong at all? Is it consistent with that usage of nations, which Sir John Nicholl recognizes, *to redress an act of wrongful violence* by the return, at any length of time, of the naked value of the article at the date of the injury?" And he states his conclusion thus: "Upon the whole, I am of opinion that the just indemnification awarded by the Emperor involves not merely the return of the value of the specific property, *but a compensation also for the subsequent and wrongful detention of it, in the nature of damages.*" (Opinions of Attorneys-General of the United States, vol. ii, pp. 29, 31, 32, 33.)

It is instructive, on the other hand, to observe the views upon the question of principle, applicable to the claim of interest, (independently of the construction of the Treaties, the Emperor's award, and the Convention of St. Petersburg,) which were expressed by the eminent Law-Officers of the British Crown. Sir Christopher Robinson was then King's Advocate, and Sir John Copley (afterwards Lord Lyndhurst) and Sir Charles Wetherell were Attorney and Solicitor-General. The King's Advocate (19th May, 1825) thought that, on general principles, interest was not payable. He referred to the same rules of private jurisprudence, which have been stated in an earlier part of the present argument:

> The rules of law, so far as they may be applicable to this question, do not favor claims of interest, except under special circumstances, as in cases of agreement, expressed or implied, or of the possession and enjoyment of intermediate profits, or of injury, properly so termed, in respect to the tortious nature of the act, for which the compensation is to be made.

He proceeded to illustrate these rules, from the laws of England and of the United States, and added:

> The principles of the General Law of Europe, as derived from the Civil Law, and adopted in the several countries, correspond with this exposition. "Interest of money is not a natural revenue, and is only, on the part of the debtor, a punishment which the law inflicts upon him for delay of payment, ('usura pecuniæ quam percipimus, in fructu non est, quia non ex ipso corpore, sed ex alia causa est, id est nova obligatione.)[1]
>
> "Usuræ non propter lucrum petentium, sed propter moram solventium infliguntur."[2]

In the result he regarded the question as entirely depending upon the true interpretation of the Treaties and the Convention of St. Petersburgh, and considered that these instruments did not support, but were, on the contrary, at variance with the claim.

The views of Sir J. Copley and Sir C. Wetherell (10th November, 1825) were in some respects different from those of Sir C. Robinson. After referring to the First Article of the Treaty of Ghent, and to the Emperor's award as to its construction, they said:

> In the removal, therefore, of the slaves in question, this engagement has been infringed, and the parties injured by such infringement are entitled to compensation.

[1] Domat, Tit. "Interest," lib. i, p. 121.

[2] Ibid., p. 419.

It must be obvious, however, that the bare restitution or payment of the value of the slaves, after an interval of so many years *from the period when they ought, according to the agreement, to have been restored,* will not form, by any means, an adequate compensation to the owners for the loss they have sustained by the breach of this Article of the Treaty; and we *think the addition of interest to the value of the slaves, such interest being calculated from the period when they ought to have been given up, is a fair and moderate mode of estimating the damage sustained by the injured parties.* In our municipal law, *where a party contracts to deliver personal property at a particular time, or where he unjustly detains the goods of another, he may be compelled to deliver such property, or to pay the value, and further to pay damages for the detention. If, therefore, the question had rested here, we should have been of opinion, upon this general reasoning, that the claim to interest ought to have been allowed by the Commissioners.* But upon adverting to the Treaty of London, to the award of the Emperor, and to the Convention of St. Petersburgh, we are led to a different conclusion.

The question upon which the British and American Commissioners and Law-Officers had thus differed was eventually settled, upon terms of compromise, by another Supplementary Convention between the two countries. But supposing that the question had been unembarrassed by any difficulties in the construction of the express Treaty engagements upon the subject, and that it ought properly to have been determined, on general principles, in accordance with the views of Mr. Wirt, Sir John Copley, and Sir C. Wetherell, it is plain that these views rested upon the simple and ordinary ground that property of ascertained value, which Great Britain had in her actual possession at the time of the ratification of the Treaty of Ghent, and which, by that Treaty, she had expressly contracted and engaged to deliver up to the United States, had been wrongfully and permanently detained in violation of that engagement. The case, in these respects, was precisely similar to that under the latter clause of the Seventh Article of the Treaty of 1794.

25. Before parting entirely with this precedent, it does not seem out of place to refer to some other forcible observations, made by Sir Christopher Robinson, in an earlier opinion given to the British Government on the same subject, on March 18, 1825:

The subject of interest presents a question of considerable importance and delicacy, and to which it will be difficult to apply the analogy of rules derived from legal proceedings, independent of the political considerations, which may have regulated the conduct of the Power making compensation in the particular case. In that view, it seems to be a reasonable distinction which is raised, that Sovereign Powers do not usually pay interest, unless they stipulate so to do. The obligations of Governments for civil injuries are matters of rare occurrence, and depend, in form and substance, as much on liberal concessions, or on reciprocal engagements, as on the intrinsic justice or equity of the claim. They are usually compensations (compromises?) made on questions in doubt, after considerable intervals of time, by which interest is much enhanced. They are also compensations for the acts of others; for the consequences of error or misunderstanding rather than of intentional injury; and for cases in which no profit or advantage has accrued to the party by whom such compensation is made. Considerations of this kind seem to require that, if interest is to be paid as part of the compensation by Treaty, it should be matter of special arrangement as to amount and particulars; and the reasonableness of that expectation supports the distinction suggested, that, where no such stipulation is made between Sovereign Powers, interest shall not be considered as due.

26. These are the words of a jurist (the reporter of the celebrated judgments of Sir William Scott, Lord Stowell) who was particularly conversant with questions of Public and International Law. Of the numerous examples of the allowance of interest between nations, without special agreement, which are supposed by the Counsel of the United States to exist, he was evidently not aware. Instances may, indeed, be found, (some before, and some later than 1825,) in which claims of individuals for interest, as a legal incident of liquidated debts and obligations have been held proper to be considered, and to be allowed if found just. There are also other instances, in which a State, acknowl-

edging itself to have made default in the payment of its own liquidated pecuniary debts and obligations to the citizens of another State, or acknowledging itself to be responsible for the wrongful appropriation and detention, by its officers or people, of property belonging to the citizens of another State, has expressly contracted to make payments or restitution, with interest at an agreed rate. But Her Britannic Majesty's Counsel, after careful inquiry from the best sources of information, has failed to become acquainted with any instance in which interest has yet been allowed as an element of damages between nation and nation in the settlement of unliquidated claims (to recur to the words of Sir C. Robinson) "for the acts of others, for the consequences of error or misunderstanding, rather than of intentional injury; and for cases in which no profit or advantage has accrued to the party by whom compensation is made."

27. The third and latest precedent, cited by the United States, is that of the recent award of Sir E. Thornton between Brazil and the United States, in the case of the ship Canada.

In the year 1857 the Minister of the United States at Rio demanded compensation from the Government of Brazil for "an outrage committed on the high seas, near the Brazilian coast, by a body of Brazilian soldiers, upon a whale-ship called the Canada, sailing under the flag, and belonging to citizens, of the United States."[1] The matter continued pending for some years, and, eventually, on the 14th March, 1870, a Convention was concluded between Brazil and the United States, by which this question was referred to the arbitration of Sir Edward Thornton, then and now Her Britannic Majesty's Minister at Washington.

Under this reference Sir Edward Thornton made his award, dated the 11th July, 1870, by which he found the following facts to be established by the evidence laid before him, viz: that, on the 27th November, 1856, the Canada grounded upon a reef of rocks within Brazilian jurisdiction; that, during the four following days, proper means were used by her captain and crew, with every prospect of success, to get her off; but that, on the 1st of December, a Brazilian officer, with fourteen armed men, boarded her, superseded the authority of the Captain, and forcibly prevented the further prosecution of the efforts which were being made to save the ship; that she would, in fact, have been saved, but for this improper interference of the officers of the Imperial Government of Brazil, and that she was lost through that interference; for which reason, he held the Imperial Government to be responsible for the value of the property so destroyed. He then proceeded to determine, according to the evidence before him, (which included proper particulars of her age and classification, and valuations of different dates,) the principal sum, representing the value of the ship at the time of her loss, and the actual cost of her outfit. He rejected all claims for prospective catch and earnings; he allowed some small sums for necessary expenses incurred by the crew in traveling; he also allowed to some of them moderate sums for three months' wages; and he allowed interest at 6 per cent. from the date of the loss, as the necessary result (in his judgment) of the liability of the Brazilian Government for the principal amount.

This decision, like those before examined, proceeded upon ordinary juridical principles. The Brazilian Government, by their officers and

[1] Dispatch of Mr. Fish to Mr. Blow, communicated to Baron Cotegipe on the 28th December, 1869.

soldiers, had wrongfully taken possession of, and had, in effect, destroyed, a United States ship within their jurisdiction, which was entitled to their protection. For the full value of the loss so inflicted upon subjects of the United States, they became immediately and directly responsible, as much as if they had seized and detained the ship, under circumstances enabling them to restore it to its owners. Restitution of the ship itself being impossible, a full compensation and indemnity became actually due, from the moment of the loss; and the payment of this compensation and indemnity, though promptly claimed, was for many years delayed. The amount of the principal loss was properly investigated and accurately determined, and the interest given was accurately computed upon that amount.

28. In every point of importance, with respect to the principles involved, this last precedent (like those which had gone before it) stands in absolute contrast with the present case. In this, as in the earlier cases, (to sum up the whole matter shortly,) those elements were found to be present, which were juridically necessary to constitute a *right* to interest; and interest was accordingly given as a matter of strict right. In the present case all these elements are absolutely wanting; and, instead of them, others are present, the effect of which is not to support, but to repel, the claim of interest, even if the appeal is made, not to any rule or principle of public law, but to the exercise of a reasonable and equitable discretion.

ROUNDELL PALMER.

XII.—REPLY ON THE PART OF THE UNITED STATES TO THE ARGUMENT OF HER BRITANNIC MAJESTY'S COUNSEL ON THE ALLOWANCE OF INTEREST IN THE COMPUTATION OF INDEMNITY UNDER THE TREATY OF WASHINGTON.

The question upon which the Tribunal is understood to have admitted argument on the part of Her Britannic Majesty's Government is, "Whether, supposing a capital sum as an adequate measure of injury, in the judgment of the Tribunal, has been arrived at, the proper indemnity for that injury involves the allowance of interest as a part of that indemnity from the date when the losses accrued to the sufferers (and as of which the capital of the losses has been computed) until the indemnity is paid?" We have had an opportunity to read the argument of Her Britannic Majesty's Counsel submitted to the Tribunal upon this question, and now avail ourselves of the right under the Treaty to reply to it, so far as such reply seems to us suitable.

I. It is important in reference to this question, as we have heretofore had occasion to suggest in respect to other questions opened for discussion by the Tribunal, to confine the argument within proper limits. By doing this in the present case, we may very briefly dispose of much that occupies a good deal of space in the learned Counsel's argument.

(*a*) The question assumes that a method of measuring the injury to the United States, and the indemnity therefor from Great Britain, has been adopted, which takes account of the losses suffered as of the dates (actual or average) when they were suffered, and fixes an amount in money which, if *then* paid to the sufferers, would, in the judgment of the Tribunal, be an adequate, and no more than an adequate, indemnity for such losses to the sufferers. Upon this view of the capital sum, in respect of which the allowance or refusal of interest thereon is in question, (and no other view seems admissible,) it is impossible to raise any other points for debate than the following:

First. Is the delayed payment of a sum which, if paid at an earlier date, would *then* be only an adequate payment, still an adequate payment without compensation for the delay?

There can be but one answer to this question. The earlier and the later payments cannot *both* be adequate, and not more than adequate, to the same obligation, unless they are equivalent to each other. But common sense rejects the proposition that a present payment of money and a delayed payment of the same sum are equivalent. They are not the same to the creditor or sufferer who receives the payment, nor to the debtor or wrong doer who makes the payment.

Compensation for the delay of payment is necessary to make present and delayed payments equivalent to each other, and each equal to the same obligation.

It thus being clearly impossible that earlier and later payment should be equivalent, whenever, in fact, only the later payment can be, and is to be, made, it must draw with it the compensation for the delay in the nature of interest, provided it is intended that the parties should stand after the delayed payment as they would have stood after an earlier payment.

Second. It will be readily admitted that this necessary compensation for delay in payment of a sum, which has been computed as a just payment, if made without any delay therein, cannot be justly withheld, unless there shall have been some fault on the part of the creditor or sufferer whereby the delay of the adequate payment is imputable to him.

We imagine that the principles of private law governing this question and justifying the refusal of interest for delay of payment all turn upon this, viz: that the debtor was ready to pay and the creditor was unwilling to receive.

It is true, in addition, that the jurisprudence of Great Britain and of the United States permits nothing but an actual *tender* of the sufficient sum, and a continued keeping of the sum good for payment on the part of the debtor, and a refusal to receive on the part of the creditor, to stop the running of interest on the debt.

The other class of cases, in which the debt is frequently spoken of as not drawing interest, more accurately should be described as a situation wherein the transactions between the parties do not culminate in any obligation of one party to pay, or right of the other party to demand, until, as a part of those transactions, there has been an ascertainment of amounts, and a demand of payment.

These are cases of mutual accounts, or of open demands, as yet unliquidated. Until the eventual creditor strikes his balance, or computes and demands his debt, *there is no delay of payment*, requiring compensation between the parties.

Third. There seems to be no other possible reason in the nature of things for refusing to add interest for delayed payment to a sum which was a mere indemnity, had it been promptly paid, other than a disposition not to give *full* indemnity, that is, an intention *to apportion the loss.*

But this disposition, if it should be just, can hardly be said to raise any question of the allowance of *interest* any more than of the allowance of principal. It will be all the same to the American sufferer who fails to receive the full indemnity which delayed payment involves, whether the sum which is actually paid him is computed by the Tribunal as half his principal loss with interest added, or the whole of his principal loss without interest. It is all the same to Great Britain in making the payment, whether the reduction from a full indemnity is computed by refusing the full capital, and calculating interest on the part allowed, or by allowing the full capital and refusing all interest upon it. The fact that full indemnity is or is not given cannot be disguised. It will not be more than given because interest is allowed. It will not be any less withheld because the part withheld is withheld by the refusal of interest.

II. If these views are correct it will be seen that, notwithstanding the very extended discussion of Her Britannic Majesty's Counsel, the real considerations which should affect the allowance or disallowance of interest in the computation of the award of the Tribunal lie within a very narrow compass.

(*a*) We may lay aside all the suggestions that interest on the capital sum, as it has been adopted or shall be adopted by the Tribunal, should not be allowed, because the capital is or is like to be excessive, and interest would be an additional injustice.

These ideas are put forth in sections 14, 17, and 18 of the learned Counsel's argument under two heads, (1) that the computation by the Tribunal of the capital will be excessive *per se*, and (2) that it will be excessive by adopting in *coin* values that are stated in *paper* currency.

In the first place, all this is not a reason for refusing *interest*, but for correcting the computation of capital on which the interest should be computed. We cannot enter into any such rude judgment as this. We are not invited to criticise the Tribunal's computation of the *capital* of the losses. We are not advised what that computation is or is to be. We have exhibited to the Tribunal evidence and computations bearing upon the just measure of the capital of the losses. If those should be adopted by the Tribunal, there is no danger of excessive indemnity to the sufferers. We have also exhibited to the Tribunal the evidence and the reasons upon which we insist that the valuations given to property in the "Claims" as presented are to be paid in coin. We do not repeat them here. But we protest against an attack, in the dark, upon the Tribunal's *measure* of the *capital* of the losses, under the form of an argument against the allowance of interest.

(*b*) We may also lay aside the suggestions prejudicial to the allowance of interest on the claims which, by subrogation or assignment, have been presented by the *insurers* who have indemnified the original sufferers. So far as Great Britain and this Tribunal are concerned, who the private sufferers, and who represent them, and whether they were insured or not, and have been paid their insurance, are questions of no importance. But it is worth while to look this argument in the face for a moment. Some of the sufferers by the depredations of the Alabama, the Florida, and the Shenandoah were insured by American underwriters. These sufferers have collected their indemnity from the underwriters, and have assigned to them their claims.

The enhanced premiums of insurance on general American commerce have, presumptively, enriched the insurance companies. Great Britain should have the benefits of these profits, and the underwriters, at least, should lose interest on *their* claims! It is difficult to say whether the private or the public considerations which enter into this syllogism are most illogical. Certainly we did not expect that "*the enhanced payments of insurance*," which Great Britain could not tolerate, and the Tribunal has excluded as too indirect consequences of the acts of the cruisers to be entertained *when presented by the merchants who had paid them*, were to be brought into play by Great Britain itself as direct enough in the general business of underwriting, to reduce the indemnity on insured losses, which, if uninsured, they would have been entitled to.

(*c*) Equally irrelevant to this particular question of interest are the considerations embraced in section 11 of the learned Counsel's argument. These relate (1) to the fact that the belligerent aid given by Great Britain, for which it is now to be charged as responsible, were given in aid of the rebels against the Government of the United States in their attempt to overthrow it, and that by the triumph of the Government these rebels have been merged in the mass of the population of the United States. This idea, as intimated in the principal discussions of the British Case and Counter Case, has been responded to by us already, so far as it seemed to us to require response. (Argument, p. 479.) It certainly has no special application to the question of interest. The notion seems more whimsical than serious, but whatever weight it possesses should have been insisted upon *before or while* making *the Treaty of Washington*. The terms of that Treaty have relieved the Tribunal from any occasion to weigh this argument.

But (2) in section 11 of the learned Counsel's argument it is insisted that the allowance of interest, as a part of the indemnity, should be affected by the circumstances of the failure of the United States sooner to cut short the career of the cruisers, for whose depredations Great

Britain is now held responsible. A plea to this effect, based upon efforts of Great Britain to arrest, disarm or confine these cruisers, and thus reduce the mischiefs for which it is held responsible, would have had some merit. But, alas! the Proofs furnish no support for such a plea.

As to the action of the United States, however unsuccessful, it will be time enough for Great Britain to criticise it as inefficient when its Navy has attempted the chase of these light-footed vagabonds, which found their protection in *neutral* ports from blockade or attack, and sought remote seas for their operations against peaceful commerce. But this consideration has no special application to the question of *interest.*

III. We now come to an examination of some suggestions which purport to bear upon the question, whether there may not be found in the relations between the parties in respect to, and their dealings with, these claims, some reasons why interest should, for affirmative cause, be withheld.

(*a*) It is said that Great Britain is not in a position of having had *value to herself*, and so the reasons for adding interest against one who withholds a debt representing money that he has had and, actually or presumptively, keeps and enjoys, or detains property whose profits he actually or presumptively receives and enjoys, do not apply.

It is true, *these precise* reasons do not apply, and they do not any more in a multitude of private cases, where, nevertheless, the indemnity exacted for wrong-doing, or the payment required to make whole the creditor, involves the payment of interest.

It has never been suggested that, when the injury consisted in an actual destruction of property, the wrong-doer was less liable for interest as a part of a delayed indemnity than when he had applied it to his own use, and reaped the advantages thereof. So, too, in matter of contract, the surety being liable for the debt, is just as liable for the interest as if he had received and was enjoying the money. So, too, where one is made responsible for the injury which his dog has done to his neighbor's sheep, he pays interest for delayed indemnity just as much as if he wore their wool or had eaten their mutton.

In fine, the question in respect of contracts is, whether the contract expresses or imports interest, and, in respect of torts, whether indemnity is demandable or is to be mitigated. If indemnity is demandable, it has never been held to be complete unless it included compensation for delay. Besides, in this actual case, suppose that twenty millions of dollars are a measure of the indemnity that Great Britain should pay for the capital of the losses suffered for which it is responsible. This means that, if that sum had been paid when the loss happened, the sufferer would have been made whole and the wrong satisfied. Instead of that adjustment having been made, instead of that sum of money having *then* passed from the wealth of Great Britain into the hands of the sufferers, they have been kept out of it, and Great Britain has retained it. It is in vain to say then that the delay of payment has not left Great Britain in the possession of the money during the interval, for the contrary is true. The lapse of time has all the while been to the gain of the indemnifier and to the loss of the sufferer, unless interest added corrects the injustice of delay.

(*b*) But it is said that the indeterminate or unascertained amount of these injuries precludes the allowance of interest on the capital that shall be finally ascertained. To us this seems no more sensible than to say that interest should not be allowed, because the date from which or to which

it was to run, also needed to be ascertained before it could be computed. The problem before the Tribunal, as bearing upon this question of interest, may be very simply stated.

The injuries for which Great Britain is to make indemnity, happened in the years 1863 to 1865. The Treaty of Washington provides that the sum for their indemnity, as fixed by the Tribunal, shall be paid within one year after the award.

What sum, payable as of this date, will be an indemnity for destruction of property occurring seven, eight, and nine years ago?

Manifestly, the question whether Great Britain should pay interest is an inseparable part of the question whether it is to make indemnity.

(*c*) But it is said that for a certain period of time the United States are responsible for the delay of payment by Great Britain, and for that period Great Britain should be exempted from interest. This period is put as from the failure of the Johnson-Clarendon Convention, negotiated in London January, 1869, but not ratified by the United States. If this means anything, it means that Great Britain, in January, 1869, was ready then to pay to the United States the sum that this Tribunal shall find reason to fix under the Rules of the Treaty of Washington, and so notified the United States. The intervening delay, consequently, in the receipt of the money is chargeable to the United States. Thus put, the proposition is intelligible, but utterly unsupported by the facts of the case.

Great Britain has never admitted its liability to the United States in the premises for a single ship destroyed by any one of the cruisers, nor is it pretended to the contrary. Of what value is it then to say, that if Great Britain and the United States had been able to agree upon different and earlier arbitration there might have been an earlier award, and so interest should cease from a date when Great Britain was ready to accede to an arbitration upon certain terms which the United States rejected? Certainly the efficacy of this novel limitation on the running of interest must date from the probable period of the award under the failing arbitration. Upon no reasonable conjecture could the commission of claims arranged by that convention have produced its award at all in advance of what may be expected from this Tribunal.

We leave out of consideration, as wholly irrelevant, the suggestions that it was to the non-concurrence of the Senate of the United States that the failure of the previous attempt at arbitration was due. That arbitration failed because the United States did not ratify the convention. But to give any force to this argument, it should appear that the United States in the present Treaty have simply, at a later date, concurred in what they then refused. This is not pretended. Indeed, it is to the presence of the Three Rules of the Treaty of Washington as the law of this Arbitration that Great Britain seems disposed to attribute its responsibility to the United States, if, in the judgment of this Tribunal, it shall be held responsible. We respectfully submit that there is no support, in fact or in reason, for this attempted limitation on the period of interest to the date of the Johnson-Clarendon Convention.

(*d*) The argument of the learned Counsel concludes with a criticism upon the cases under the Jay Treaty, and under the Treaty of Ghent, and the case of the Canada, as decided by Sir Edward Thornton, all of which were adduced by us in our principal argument as pertinent on the question of interest, (p. 220.) We must think, with great respect to the observations of the learned Counsel upon these cases, that their authority remains unshaken. We respectfully submit herewith a

statement, showing what computation of interest we suppose would rightly satisfy the demands of the United States in this behalf.

In conclusion, we may be permitted to repeat, in reference to this element of computation of a just indemnity, what we have said on the general measure of indemnity:

> This principal question having been determined, if Great Britain is held responsible for these injuries, the people of the United States expect a just and reasonable measure of compensation for the injuries as thus adjudicated, in the sense that belongs to this question of compensation, as one between nation and nation. (American Argument, p. 225.)

It is a matter of the greatest interest to both nations that the actual injuries to private sufferers from the depredations of the cruisers, for which Great Britain shall be held responsible, shall be fairly covered and satisfied by that portion of the award what shall be applicable to and based upon them. That this cannot be expected without an allowance of interest, is obvious.

A recognized right to indemnity, and a deficient provision of such indemnity, should be the last thing to be desired as a solution of this great controversy between these nations.

WM. M. EVARTS.
C. CUSHING.
M. R. WAITE.

NOTE TO THE REPLY.

Summary of the American claims, with interest at 7 per cent. added.

	Principal.	Interest.	Total.
Alabama	$6,557,690 00	$4,740,420 04	$11,298,110 04
Florida	4,616,303 93	3,257,760 85	7,874,664 78
Shenandoah	3,663,277 46	2,123,741 46	5,787,018 90
	14,837,271 39	10,121,922 35	24,959,193 72

In case the Arbitrators reject column 5, under the heading Shenandoah, the total amount of claims will be—

	Principal.	Interest.	Total.
	$14,476,921 39	$9,615,659 26	$23,993,189 65

NOTE.

(*a*) Interest is calculated above at the rate of 7 per cent. a year.

(*b*) It is calculated for the true average of time of the captures by each cruiser, namely: By the Alabama, for ten years and two months; by the Florida, for ten years and one month; by the Shenandoah, for eight years and five months.

ALABAMA.

Names of vessels.	Amount of claims.	Time of capture.	Interest at 6 per cent. up to the month of September, 1873, one year after the date of the decision.
Alert	$44,803 91	No date.	$28,874 50
Altamaha	27,165 60	September, 1862	17,929 30
Benj. Tucker	127,610 06	September, 1862	84,222 64
Courser	50,752 53	September, 1862	33,496 70
Elisha Dunbar	88 200 00	September, 1862	58,212 00
Kate Cory	53 760 25	April, 1863	33,700 16
Kingfisher	53,292 17	March, 1863	33,574 07
Lafayette 2d	111,747 00	April, 1863	69,841 87
Levi Starbuck	168,415 00	November, 1862	109,469 75
Nye	107,974 25	April, 1863	67,483 90
Ocean Rover	145,271 03	No date.	92,973 50
Ocmulgee	269,505 00	September, 1862	177,873 30
Virginia	77,025 00	September, 1862	50,836 50
Weather Guage	23,515 00	September, 1862	15,519 90
Brilliant	135,457 83	October, 1862	88,724 88
Chas. Hill	56,464 93	March, 1863	35,572 90
Conrad	101,646 00	June, 1863	62,512 29
Crenshaw	34,399 49	October, 1862	22,531 66
Express	103,820 00	July, 1863	63,330 20
Golden Eagle	129,222 50	February, 1863	82,056 29
Jabez Snow	104,518 00	May, 1863	64,801 16
John A Parks	137,715 50	March, 1863	86,760 76
Lafayette	132,250 10	October, 1862	86,623 81
Lamplighter	34,355 00	October, 1862	22,830 02
Louisia Hatch	95,625 00	April, 1863	65,503 12
Palmetto	27,858 33	February, 1863	17,690 04
Rockingham	169,954 05	April, 1864	107,324 04
S. Gildersleeve	48,015 00	May, 1863	29,769 30
Wave Crest	64,629 10	October, 1863	38,454 31
Amanda	78,678 01	November, 1863	46,420 03
Amazonian	143,612 82	June, 1863	88,321 88
Anna F. Schmidt	308,544 49	July, 1863	188,212 14
Contest	158,465 97	November, 1863	93,494 92
Dorcas Prince	69,644 60	April, 1863	43,527 87
Dunkirk	21,250 00	October, 1862	13,918 75
Golden Rule	96,840 70	1863?	56,167 60
Lauretta	37,264 64	October, 1862	24,408 34
Martaban	69,662 75	December, 1863	40,752 71
Olive Jane	97,383 66	February, 1863	61,838 62
Parker Cook	31,089 56	November, 1862	20,208 21
Sea Bride	155,944 12	August, 1863	94,346 19
Talisman	247,765 00	June, 1863	152,375 48
Sea Lark	323,725 14	May, 1863	200,709 59
T. B. Wales	241,261 24	November, 1862	156,819 80
Tycoon	456,589 00	Mar. or Apr., 1864	260,255 73
Union Jack	179,044 63	May, 1863	111,007 67
Winged Racer	385,867 91	November, 1863	227,662 07
Manchester	173,080 92	October, 1862	113,368 00
Chastelaine	17,595 55	January, 1863	11,261 15
Emma Jane	86,557 34	January, 1864	50,203 26
Highlander	206,171 00	December, 1863	120,610 00
Sonora	102,964 44	December, 1863	60,234 20
Ariel	10,423 38	December, 1862	6,723 08
Justina	7,000 00	No date.	4,480 00
Morning Star	5,614 40	March, 1863	3,537 07

Names of vessels.	Amount of claims.	Time of capture.	Interest at 6 per cent. up to the month of September, 1873, one year after the date of the decision.
Nora	$88,025 00	March, 1863	$55,455 75
Starlight	11,245 00	September, 1862	7,421 70
Baron de Castine	1,500 00	October, 1862	962 50
	6,557,690 00		4,063,217 18
Add one-sixth in order to increase the rate to 7 per cent			677,202 86
			4,740,420 04

The average time for the computation of interest on the value of the property destroyed by the Alabamais about ten years and two months.

We have, consequently, the following comparative results:

	Principal.	Interest at 7 per cent. for ten years and two months.	Total.
American Statement	$6,557,690 00	$4,740,420 04	$11,298,110 04
British Statement	3,267,678 00	2,363,620 36	5,631,298 36

Whatever be the sum fixed by the Tribunal as a base for the computation of interest, and whatever may be the rate that it decides to allow, the average time for the computation should be the same in all cases; that is to say, ten years and two months.

FLORIDA.

Names of vessels.	Amount of claims.	Time of capture.	Interest at 6 per cent. up to the month of September, 1873, one year after the date of the decision.
Golconda	$169,195 92	July, 1864	$93,057 75
Rienzi	20,726 00	July, 1863	12,642 86
Ada	6,300 00	June, 1863	3,874 50
Elizabeth Ann	8,650 00	June, 1863	5,319 75
Marengo	7,746 00	June, 1863	4,763 79
Rufus Choate	8,775 00	June, 1863	5,396 62
Wanderer	8,389 00	June, 1863	5,159 23
Anglo Saxon	63,695 79	August, 1863	38,535 95
Avon	183,851 40	March, 1864	104,795 29
B. F. Hoxie	115,155 00	March, 1863	72,547 65
Greenland	47,170 00	July, 1864	25,943 50
Southern Cross	79,305 00	June, 1863	48,772 57
William C. Clark	29,556 91	June, 1864	16,404 08
Mary Alvina	20,445 00	June, 1863	12,573 67

Name of vessels.	Amount of claims.	Time of capture.	Interest at 6 per cent. up to the month of September, 1873, one year after the date of the decision.
Aldebaran	$30,957 91	March, 1863	$19,503 48
Clarence	26,177 50	May, 1863	16,230 05
Commonwealth	470,533 58	April, 1863	294,083 46
Crown Point	436,073 00	May, 1863	270,365 26
Electric Spark	468,366 83	July, 1864	257,601 75
Henrietta	73,556 94	April, 1863	45,973 08
Jacob Bell	421,986 40	February, 1863	267,961 36
Lapwing	84,085 00	March, 1863	50,453 55
M. J. Colcord	107,896 21	March, 1863	67,974 60
Red Gauntlet	124,475 94	June, 1863	76,752 70
Star of Peace	532,128 65	March, 1863	335,241 04
William B. Nash	68,724 94	July, 1863	41,922 21
Oneida	471,849 12	April 24, 1863	294,905 70
Windward	22,598 00	January, 1863	14,462 72
Estelle	24,925 00	January, 1863	15,952 00
Zelinda	42,925 00	July, 1864	23,608 75
Umpire	35,530 00	June, 1863	21,850 95
Mondamin	35,549 00	Sept., 1864	19,206 26
Corris Ann	34,485 00	January, 1863	22,070 40
General Berry	35,918 48	July, 1863	21,910 27
George Latimer	49,831 33	May, 1864	27,905 54
Harriet Stevens	51,925 00	July, 1864	26,558 75
Byzantium	63,240 51	June, 1863	38,892 91
Goodspeed	43,218 30	June, 1863	26,579 25
M. Y. Davis	18,604 00	No date.	11,441 46
Tacony	39,622 00	June, 1863	24,367 53
Whistling Wind	12,594 10	No date.	7,745 37
Archer	4,300 00	No date.	2,644 50
Ripple	10,755 00	June, 1863	6,614 32
	4,616,303 93		2,792,366 45
Add one sixth in order to increase the rate to 7 per cent			465,394 40
			3,257,760 85

The average time for the computation of interest on the value of property destroyed by the Florida and her tender is (about) ten years and one month.

The comparative results are:

	Principal.	Interest of 7 per cent. for ten years and one month.	Total.
American Statement	$4,616,303 93	$3,257,760 85	$7,874,064 78
British Statement	2,635,573 00	1,860,263 60	4,495,836 60

Whatever may be the sum fixed by the Tribunal as a base for the computation of interest, and whatever may be the rate that it shall decide to allow, the average time for the computation should be the same in all cases, namely, ten years and one month.

SHENANDOAH.

Names of vessels.	Time of capture.	Amount of claims.	Interest up to the month of September, 1873, one year after the date of the judgment.
Abigail	May, 1865	$100,531 79	See table 2.
Brunswick	June, 1865	103,874 50	Do.
Catherine	June, 1865	93,670 90	Do.
Congress	June, 1865	177,587 00	Do.
Covington	June, 1865	88,802 50	Do.
Edward Carey	April, 1865	72,047 70	Do.
Euphrates	June, 1865	96,846 50	Do.
Favorite	June, 1865	169,693 44	Do.
Gen. Williams	June, 1865	113,905 85	Do.
Gipsey	June, 1865	95,457 75	Do.
Hector	April, 1865	125,620 80	Do.
Hillman	June, 1865	157,366 50	Do.
Isaac Howland	June, 1865	205,951 00	Do.
Isabella	June, 1865	159,987 00	Do.
Jireh Swift	June, 1865	107,273 25	Do.
Martha	June, 1865	129,779 02	Do.
Nassau	June, 1865	181,279 50	Do.
Nimrod	June, 1865	162,124 87	Do.
Sophia Thornton	June, 1865	106,759 31	Do.
Susan Abigail	June, 1865	56,993 37	Do.
Waverly	June, 1865	135,655 25	Do.
William Thompson	June, 1865	180,968 75	Do.
William C. Nye	June, 1865	98,377 50	Do.
Pearl	April, 1865	55,685 50	Do.
Almira	.....		
Europa	.....		
Gen. Pike	June, 1865		
James Maury	June, 1865		
Milo	June, 1865	333,500 00	
Nile	June, 1865		
Richmond	.....		
Splendid	.....		
Australia	.....		
Louisiana	.....		
		3,263,149 55	

Second table.—Shenandoah.

Names.	Claims.	Interest.
The vessels Edward Carey, Hector, and Pearl were captured in April, 1865	$253,354 00	$127,943 77
The Abigail was captured in May	100,531 79	50,265 89
The other vessels were captured in June, 1865	2,909,263 76	1,440,075 56
Add 25 per cent. of the value of the whalers	400,127 91	202,064 59
		1,820,349 81
Add $\frac{1}{6}$ in order to increase the interest to 7 per cent	....	303,391 63
	3,663,277 46	2,123,741 44

The average time for the computation of interest on the value of property destroyed by the Shenandoah is nearly eight years and five months.

Comparative Results.

	Principal.	Interest at 7 per cent. for 8 years and 5 months.	Total.
American Statement	$3,663,277 46	$2,123,741 44	$5,787,018 90
British Statement	1,171,464 00	690,187 54	1,861,651 54

If the Arbitrators reject as double claims the claims for insurance in column five, (5,) the American Statement will be as follows:

	Principal.	Interest.	Total.
American Statement	$3,202,957 46	$1,617,478 37	$4,820,405 83
British Statement	1,171,464 00	690,187 54	1,861,651 54

Whatever may be the sum fixed by the Tribunal as a base for the computation of interest, and whatever may be the rate that it decides to allow, the average time for computation should be the same in all cases, namely, eight years and five months.

XIII.—COMPARATIVE TABLES, PRESENTED BY THE AGENT OF THE UNITED STATES ON THE 19TH OF AUGUST, 1872, IN COMPLIANCE WITH THE REQUEST OF THE TRIBUNAL.

In accordance with the instructions of the Tribunal, the Agent and Counsel of the United States have caused tables to be prepared, showing the differences which exist between the statements of claims and losses submitted to the Tribunal on the part of the United States, for the estimates based on these statements which have been presented on the part of Great Britain.

The claims presented by the United States are supported by sworn statements presented by those who possess the necessary information, and they exhibit in detail the items which go to form the sum total, and the names of all who have made reclamation, whatever may be the sum which the Tribunal may see fit to award. The claims on the part of private individuals thus computed, verified, and submitted, are supported by all the guarantees of their good faith and their validity, as well for their general amount as for the other facts concerning them which governments are in the habit of requiring, in such cases, from their own citizens. It thus appears that these computations show the entire extent of all private losses which the result of the adjudications of this Tribunal ought to enable the United States to make compensation for.

In certain cases, however, there is reason to believe that more claimants than one appear for the same injury. In such cases the United States have impartially presented the statements of all the claimants, intending, when the proper time should arrive, to endeavor to show, from the evidence, what sum Great Britain should in justice be held to pay, by way of compensation for real losses, without prejudice to conflicting rights. We have done our best to prepare tables by which it seems to us that the Tribunal must be enabled to determine with sufficient accuracy the amount of these double claims, if indeed any such exist.

It is not easy to conform to those instructions of the Tribunal which require the preparation of tables which can be compared with those of Great Britain. While the American statement sets forth details, and furnishes the Tribunal with all the necessary means of making a minute examination, vessel by vessel, and claimant by claimant, the British statement is a generalization based on certain facts which are taken for granted, and which exist, in the opinion of the authors, in the commercial world. It is not therefore possible for us to present comparative views touching the various claimants in detail, or even touching the various vessels destroyed by the cruisers.

The authors of the British statement have classified our claims in so arbitrary a manner that we are forced to confine ourselves to a comparison of the sums total contained in their classified tables. On our side, a knowledge of these sums total is reached by following the evidence, step by step; on theirs by a process of reasoning. The two systems differ so widely that a detailed comparison is impossible. All that remains for us to do is to beg the Tribunal to refer to what has already been said on this subject in the American Argument. (American Argument, note D.)

We are, therefore, forced to follow the British arrangement in order to compare the sums total, since it is impossible to compare our views in detail or according to any combination differing from that which is followed in their arrangement. We give their classification below:

A.—Claims arising from the capture of whalers or fishing-vessels.
B.—Similar claims arising from vessels carrying cargoes composed of one kind of goods.
C.—Similar claims arising from vessels carrying cargoes composed of various kinds of goods.
D.—Similar claims arising from vessels in ballast.
E and F.—Divers claims which could not properly be placed in any of the above categories.

Before coming to special vessels we desire to call attention to three well-marked points of difference between the two statements.

(*a*) The United States ask here, as they have already done in their memorial and in their argument, that the Tribunal should grant them interest on the sums which they may determine to regard as the extent of the original injury, as a necessary and indispensable part of the indemnity due to them in consequence of that injury. This interest ought to be at the ordinary rate which prevails in the United States, where the damages were suffered and where the losses are to be indemnified. The interest should be computed from the time when the losses occurred up to the time fixed by the Tribunal for the payment.

(*b*) In the American statement, especially in the claims arising from the destruction of whaling vessels, expected profits, or "the prospective catch," is included in the computation of damages. (See American Argument, note D.)

(*c*) According to the arbitrary assumption of the British statement, that the freight claimed by the United States in the name of their merchant navy constitutes "gross freight," this statement rejects all claims for freight, while, in the absence of any evidence to the contrary, we assume that these claims are for "net freight."

These three classes form in the sum total a great part of the differences which exist between the two statements.

In accordance with the suggestions of some of the Arbitrators we have eliminated from the tables the claims submitted in favor of whaling vessels for the "prospective catch," the amount of which would be $4,009,302.50; but we by no means intend to withdraw these claims, or to intimate that we do not consider them just. On this subject we refer the Arbitrators to the note alluded to at the close of the American Argument. Should the Tribunal share our views, the claims for injuries suffered by these vessels should be proportionately diminished. In case it should not share our views, we should ask it to grant us, as an equivalent, interest at the rate of 25 per cent. on the value of the vessel and equipments.

We have been obliged to trust to arbitrary estimates in regard to two subjects, because there is no sworn evidence in relation to them; viz:

(A.) The pay of the officers and crews of the captured vessels.

(B.) The value of their personal effects.

We have every reason to believe that the sums total which we submit to the Tribunal are for the most part correct in substance.

(A.) We calculate for each vessel of class A, whose burden did not exceed 300 tons, one captain at $150 per month; one first officer at $100 per month; one second officer at $75 per month; one third officer at $60 per month; one fourth officer at $50 per month; four helmsmen at $40 each per month; four helmsmen at $30 each per month; and four-

teen men at $20 each per month; and we calculate one additional man at $20 per month for every fifteen tons in excess of 300 tons.

In the statements relative to the vessels designated under letter A, there is, in the annexed tables, a calculation of wages which exceeds the correct sum of $120 per month for each vessel. The error is corrected at the end of the respective columns of each table, and the sum total is finally stated correctly. The error was not discovered in season to correct it in the detailed statements, without again subjecting the Tribunal to the inconvenience of a delay.

For each vessel of classes B, C, D, E, and F, whose burden did not exceed 300 tons, we calculate one captain at $150 per month; one first officer at $100 per month; one second officer at $75 per month; and ten men at $20 each per month. For every additional 30 tons we calculate an additional man at $20 per month.

The wages are calculated, except in certain specified cases, from the commencement of the voyage up to the time of the capture, and when the capture took place in the Atlantic Ocean, or when the capture of a vessel whose owner resided on the Pacific coast took place in the Pacific Ocean, they are calculated for six months additional; for nine months additional when the owner resided on the Atlantic coast, and the capture took place in the Pacific Ocean. This additional sum is to pay the expenses of the return after the capture, and of the time passed on the way.

(B.) In some cases the officers or men have presented claims for the value of their personal effects. We have submitted no claim for such persons in the general table under the name of each vessel. When no special claim is presented we submit a general claim, according to the following estimate, viz, for each captain $1,000; for each first officer, $750; for each second officer, $500; for each third and each fourth officer, $250; and for each helmsman and each seaman $100; we consider these estimates moderate.

It remains for us to explain the annexed tables. The detailed tables contain six columns, numbered respectively 1, 2, 3, 4, 5, and 6. Column 1 contains the items which form the sum total of the claims under the name of each vessel captured. We give the name of each vessel captured, its burden and the claims which were presented in its behalf on the 15th of April. We add a statement of the sums which must be subtracted from the sum total, and of those which must be added to it, according to the rules which we have established. Column 2 shows the said sum total, without the "prospective catch," the "expected profits," or the "breaking up of the voyage." It embraces the sums which are detailed in columns 3, 4, and 5. Column 3 shows the claims for insurance which are undoubtedly not double claims. Column 4 shows certain claims for insurance, in regard to which the evidence is silent. It is possible that some of these should be deducted from the sum total of column 2; this can only be determined by an examination of the facts in each case. Column 5 shows still other claims for insurance, according to which the owners of the property insured claim, at the same time, full indemnity for their losses, without regard to the insurance embraced in this column. It is for the tribunal to decide whether these claims should or should not be deducted from column 2. Column 6 contains remarks.

The decisions rendered by the tribunal, in relation to the Georgia, Sumter, Chickamauga, Tallahassee, Retribution, &c., have necessitated a modification of the certificates of the Navy Department of the United States, touching the national claims, which certificates were pro-

duced according to the provisions of the protocol accompanying the treaty of Washington. (American Memorial, French text, page 3.)

In the annexed tables this modification has been made by deducting from the sum total, submitted December 15, 1871, the expenses caused by the acts of vessels for the acts of which the Tribunal has decided that it could not hold Great Britain responsible.

The summing up shows the sum total of the claims now submitted on the part of the United States, including the "prospective catch," and the sums total embraced in the classified British estimates submitted in the Counter Memorial and in the Argument of Great Britain.

CLASS A.—FLORIDA.

Detailed statement.	Total amount of claims presented April 15, 1872.	Total amount of claims, including wages and personal property of crew.	Claims for insurance, the amounts of which are expressly stated in the claims, and which are to be added to the loss of the owners, including cases in which the owners present no claim for insurance.	Claims for insurance to be submitted to the decision of the Tribunal as to whether they are to be considered as being comprised in the claims of the owners.	Claims for insurance in which the owners protest against any reduction of their claim on account of insurance.	Remarks.
	1	2	3	4	5	6
Page 175.—Golconda—330 65-95 tons	$162,080 92					In this case, since the vessel was captured near the coast of the United States, at a time when its voyage was nearly ended, wages have been computed for three months only.
We add the wages of 29 men for 3 months..... $3,465						
Personal property not included in the claim.... 3,650						
	7,115 00					
		$169,195 92	$57,010 00	$6,385 00	$10,000 00	
Page 195.—Rienzi—(tonnage not stated)	8,487 00					In this case, since the vessel was captured near the coast of the United States, at a time when it had not finished its voyage, wages have been computed for four months only. No insurance.
This vessel is represented by only six-eighths of the parties interested; we therefore add two-eighths to complete the claim.	2,829 00					
We add the wages of 27 men for 4 months..... 4,460						
Personal property..... 4,950						
	9,410 00					
		20,726 00				
Page 207.—Ada	5,300 00					
We add for personal property..... 1,000						
	1,000 00					
		6,300 00				
Page 208.—Elizabeth Ann—91 tons	8,100 00					
We deduct loss arising from breaking up of voyage ...	1,400 00					
	6,700 00					
We add wages of 7 men for 3 months 950						
Personal property..... 1,000						
	1,950 00					
		8,650 00				
Page 210.—Marengo—82 tons	7,296 00					
We deduct loss arising from breaking up of voyage....	1,500 00					
	5,796 00					
We add wages of 7 men for 3 months 950						
Personal property..... 1,000						
	1,950 00					
		7,776 00				

CLASS A.—FLORIDA—Continued.

Detailed statement.	Total amount of claims presented April 15, 1872.	Total amount of claims, including wages and personal property of crew.	Claims for insurance, the amounts of which are expressly stated in the claims, and which are to be added to the loss of the owners, including cases in which the owners present no claim for insurance.	Claims for insurance to be submitted to the decision of the Tribunal as to whether they are to be considered as being comprised in the claims of the owners.	Claims for insurance in which the owners protest against any reduction of their claim on account of insurance.	Remarks.
	1	2	3	4	5	6
Page 210.—Rufus Choate—90 tons	$8,325 00					
We deduct loss caused by breaking up of voyage	1,500 00					
	6,825 00					
We add wages of 7 men for 3 months $950						
Personal property 1,000						
	1,950 00					
	7,839 00	$8,775 00				
Page 212.—Wanderer—94 tons						
We deduct loss caused by breaking up of voyage	1,400 00					
	6,439 00					
We add wages of 7 men for 3 months 950						
Personal property 1,000						
	1,950 00					
		8,389 00				
		229,781 92	$57,010 00	$6,385 00	$10,000 00	

CLASS B.—FLORIDA.

Page 126.—Anglo-Saxon—868 tons	$42,710 79					
The claim of the owners for this vessel is represented by only one-half of the parties interested; we therefore add one-half for E. Mott Robinson in order to complete the claim.	9,500 00					
We add wages of 32 men for 7 months $6,335						
Personal property 5,150						
	11,485 00					
		$63,695 79	$24,500 00			

Page 127.—Avon—946 tons		171, 401 40				No estimate is made of the value of the personal property or of the pay of the captain; likewise none of the value of the personal property of the first officer.
We add wages of 35 men for 10 months, pay of captain not included	8, 750					
Personal property not included in the claim	3, 700					
		12, 450 00				
			183, 851 40	72, 000 00		
Page 129.—B. F. Hoxie—1,387 tons		98, 000 00				No insurance. No estimate is made of the value of the personal property of the captain or of his pay.
We add wages of 49 men for 9 months, pay of captain not included	10, 305					
Personal property of 49 men	6, 850					
		17, 155 00				
			115, 155 00			
Page 177.—Greenland—549 85-95 tons		16, 795 00				No estimate is made of the value of the personal property of the captain or of his pay.
We add the amount of insurance paid by the United States Government.		23, 500 00				
We add wages of 21 men for 7 months, not including captain's pay	3, 895					
Personal property not included in the claim	3, 050					
		6, 945 00				
			47, 170 00	25, 100 00		
Page 195.—Southern Cross—938 48-95 tons		65, 450 00				
We add wages of 34 men for 9 months	8, 505					
Personal property	5, 350					
		13, 855 00				
			79, 305 00	65, 450 00		
Page 204.—William C. Clark—338 tons		22, 391 00				
We add wages of 14 men for 7 months	3, 815					
Personal property	3, 350					
		7, 165 00				
			29, 556 91	5, 000 00		
Claim for depredations by the Clarence, a tender to the Florida.						
Page 205.—Mary Alvina—260 tons		14, 520 00				No insurance. No estimate is made of the value of the captain's personal property.
We add wages of 13 men for 7 months	3, 675					
Personal property	2, 250					
		5, 925 00				
			20, 445 00			
			539, 179 10	192, 050 00		

CLASS C.—FLORIDA.

Page 125.—Aldebaran—189 41-95 tons		$25, 032 91				Observe that there is only one claim for the cargo, $47,606; but since the vessel contained a general cargo we must expect other claims. No estimate is made of the value of the captain's personal effects.
We add wages of 13 men for 7 months	$3, 675					
Personal property not included in the claim	2, 250					
		5, 925 00				
			$30, 957 91			

CLASS C.—FLORIDA—Continued.

Detailed statement.		Total amount of claims presented April 15, 1873.	Total amount of claims, including wages and personal property of crew.	Claims for insurance, the amounts of which are expressly stated in the claims, and which are to be added to the loss of the owners, including cases in which the owners present no claim for insurance.	Claims for insurance to be submitted to the decision of the Tribunal as to whether they are to be considered as being comprised in the claims of the owners.	Claims for insurance in which the owners protest against any reduction of their claim on account of insurance.	Remarks.
		1	2	3	4	5	6
Page 130.—Clarence—253 12-95 tons		$20, 252 50					The owners of this vessel have not yet presented their claim. No estimate of the value of the captain's personal effects is made.
We add wages of 13 men for 7 months	$3, 675						
Personal property not included in the claim	2, 250						
		5, 925 00					
			$26, 177 50	$19, 400 00			
Page 130.—Commonwealth—1,275 6-95 tons		454, 603 58					Observe the claim for commission, $204,470. No estimate is made of the value of the personal effects of a seaman.
We add wages of 46 men for 8 months	9, 480						
Personal property not included in the claim	6, 450						
		15, 930 00					
			470, 533 58	190, 938 00			
Page 148.—Crown Point—1,098 82-95 tons		423, 903 00					No estimate is made of the value of the personal effects of the 1st and 3d officers, or of the amount of their pay.
We add wages of 40 men for 8 months	7, 470						
Personal property not included in the claim	4, 700						
		12, 170 00					
			436, 073 00	248, 354 19			
Page 162.—Electric Spark—810 tons		457, 361 83					The Tribunal will decide with regard to the article of $40,000 for insurance, whether the claim is not made twice for the same article.
We add wages of 30 men for 7 months	6, 055						
Personal property	4, 950						
		11, 005 00					
			468, 366 83	104, 795 00			
Page 179.—Henrietta—437 67-95 tons		65, 806 94					No estimate is made of the value of the personal effects of the captain.
We add wages of 18 men for 8 months	5, 000						
Personal property not included in the claim	2, 750						
		7, 750 00					
			73, 556 94	20, 000 00			
Page 180.—Jacob Bell—1,381 56-95		403, 686 40					No estimate is made of the value of the captain's personal property.
We add wages of 49 men for 10 months	12, 450						
Personal property not included in the claim	5, 850						
		18, 300 00					
			421, 986 40	270, 978 00			

Page 184.—Lapwing—590 tons		75,000 00				
We add wages of 22 men for 7 months	4,935					
Personal property not included in the claim	4,150					
		9,085 00				
			84,085 00	75,000 00		
Page 185.—M. J. Colcord—374 tons		100,491 21				Observe a claim for $32,933.09, for expected profits.
We add wages of 15 men for 7 months	3,955					
Personal property	3,450					
		7,405 00				
			107,896 21	33,500 00	$500 00	
Page 192.—Red Gauntlet—1,038 tons		139,800 94				No estimate is made of the value of the personal property or of the amount of the pay of the captain and first officer after the capture of the vessel.
We deduct loss caused by breaking up of voyage		25,000 00				
		114,800 94				
We add wages of 38 men for 7 months	5,675					
Personal property not included in the claim	4,000					
		9,675 00				
			124,475 94	78,680 00		
Page 197.—Star of Peace—941 30-95 tons		519,273 65				The Tribunal will decide whether the claim for $33,815, as insurance, is not made twice for the same article. No estimate is made of the value of the captain's personal property.
We add wages for 34 men for 9 months	8,505					
Personal property not included in the claim	4,350					
		12,855 00				
			532,128 65	350,387 93	48,000 00	
Page 202.—William B. Nash—299 tons		61,799 94				The Tribunal will decide whether, in an amount of $10,000, the claim for insurance has been made twice.
We add wages of 13 men for 7 months	3,675					
Personal property	3,250					
		6,925 00				
			68,724 94	60,349 75		
Page 188.—Oneida—(tonnage not stated)		467,126 12				Observe the claim for $17,017 re-insurance. No estimate is made of the value of the captain's personal property or of the amount of his pay.
We deduct the insurance premium		1,802 00				
		465,324 12				
We add wages of 13 men for 9 months, exclusive of captain's pay	4,275					
Personal property not included in the claim	2,250					
		6,525 00				
			471,849 12	329,276 46	41,770 46	
Page 204.—Windward—199 43-100 tons		16,673 00				No estimate is made of the value of the captain's personal property.
We add wages of 13 men for 7 months	3,675					
Personal property not included in the claim	2,250					
		5,925 00				
			22,598 00	3,953 00		
			3,339,410 02	1,785,612 33	90,270 46	

CLASS D.—FLORIDA.

Detailed statement.	Total amount of claims presented April 15, 1872.	Total amount of claims, including wages and personal property of crew.	Claims for insurance, the amounts of which are expressly stated in the claims, and which are to be added to the loss of the owners, including cases in which the owners present no claim for insurance.	Claims for insurance to be submitted to the decision of the Tribunal as to whether they are to be considered as being comprised in the claims of the owners.	Claims for insurance in which the owners protest against any reduction of their claim on account of insurance.	Remarks.
	1	2	3	4	5	6
Page 171.—Estelle—298 62-95 tons	$16,000 00					
We add wages of 13 men for 7 months $3,675						
Personal property not included in the claim 3,250						
	6,925 00					
	36,000 00	$24,925 00	$4,000 00			
Page 205.—Zelinda—559 47-95 tons						
We add wages of 13 men for 7 months 3,675						
Personal property not included in the claim 3,250						
	6,925 00					
		42,925 00				
Page 211.—Umpire—293 tons	29,605 00					The value of the captain's personal property is not estimated.
We add wages of 13 men for 7 months 3,675						
Personal property not included in the claim 2,250						
	5,925 00					
		35,530 00	21,155 00			
Page 187.—Mondamin—390 24-95 tons	28,904 17					No estimate is made for personal property of captain. Observe that $4,870.83 has been received as insurance, for which no insurance company makes a claim.
We add wages of 16 men for 7 months 4,095						
Personal property not included in the claim 2,550						
	6,645 00					
		35,549 17	10,000 00			
		138,929 00	35,155 00			

CLASS E AND F.—FLORIDA.

Page 147.—Corris Ann—568 tons	$25,000 00					
We add for an error in the addition	400 00					
Wages of 20 men for 7 months $4,935						

Personal property	4,150					
		9,085 00				
Page 172.—General Berry		33,843 48	$34,485 00		$5,400 00	No estimate has been made of the value of the personal property of either the captain or first officer.
We add wages of 13 men for 3 months only	1,575					
Personal property not included in the claim	1,500					
		3,075 00				
		39,716 99	35,918 48			
Page 173.—George Latimer—198 tons						No estimate is made of the value of the captain's personal property.
We add one-quarter to the value, three-quarters only being claimed	4,189 34					
We add wages of 13 men for 7 months	3,675 00					
Personal property not included in the claim	2,250 00					
		10,114 34				
		45,000 00	49,831 33	$32,600 00		
Page 178.—Harriet Stevens						
We add wages of 13 men for 7 months	3,675					
Personal property	3,250					
		6,925 00				
		53,335 51	51,925 00	9,500 00	1,000 00	
Page 208.—Byzantium—1,048 3-95 tons						
We add wages of 25 men for 7 months	5,455					
Personal property	4,450					
		9,905 00				
		36,293 30	63,240 51			
Page 209.—Good Speed						
We add wages of 13 men for 7 months	3,675					
We add personal property	3,250					
		6,925 00				
			43,218 30			
			278,618 62	42,100 00	6,400 00	

CLASS G.—FLORIDA.

Page 185.—M. Y. Davis		$17,004 00				
We add wages of 10 men for 4 months	$800					
Personal property not included in the claim	800					
		1,600 00	$18,604 00			
		39,622 00				
Page 206.—Tacony—295 92-95 tons						
We add wages of 13 men for 4 months	2,100					
We add personal property	3,250					
		5,350 00				
			44,972 00			
Page 345.—Whistling Wind		12,594 10				In the present case no estimate has been made either of the value of the personal property or of the amount of the pay of the captain.
			12,594 10			

CLASS G.—FLORIDA—Continued.

Detailed statement.	Total amount of claims presented April 15, 1872.	Total amount of claims, including wages and personal property of crew.	Claims for insurance, the amounts of which are expressly stated in the claims, and which are to be added to the loss of the owners, including cases in which the owners present no claim for insurance.	Claims for insurance to be submitted to the decision of the Tribunal as to whether they are to be considered as being comprised in the claims of the owners.	Claims for insurance in which the owners protest against any reduction of their claim on account of insurance.	Remarks.
	1	2	3	4	5	6
Page 207.—Archer—62 26-100 tons	$4,300 00	$4,300 00				In the present case no estimate has been made either of the value of the personal property or of the amount of the pay of the captain.
Page 210.—Ripple—64 tons	8,805 00					
We add wages of 7 men for 3 months $950						
We add personal property 1,000	1,950 00					
		10,755 00				
		91,225 10				

NOTE.—Class G contains, for several vessels, claims which were not presented in the first list of claims, and which were therefore not included in the English classification, but which were among classes A, B, C, D, E, F, and G, in the classification appended to the English argument.

CLASS A.—ALABAMA.

Detailed statement.			Total amount of claims, including those of owners and insurers, but not including those for profits purely prospective and losses arising from the breaking up of voyages.	Claims for insurance, the amounts of which are expressly stated in the claim, and which must be added to the loss of the owners, including cases in which the owners make no claim for insurance.	Claims for insurance, concerning which the Tribunal will decide whether they are to be considered as included in the claims of the owners.	Claims for insurance, in which the owners protest against any reduction of their claim on account of insurance.	Remarks.
1			2	3	4	5	6
Page 5.—Alert—398 18-95 tons		$202,726 41					
We deduct loss caused by breaking up of voyage	$30,000 00						
Loss caused by failure to earn prospective profits	144,867 50						
		174,867 50					
		27,858 91					
We add wages of 34 men for 9 months	11,295 00						
We add wages for personal property	5,650 00						
		16,945 00					
			$44,803 91	$13,300 00			
Page 6.—Altamaha—119 37-95 tons		32,755 60					No insurance.
We deduct loss of prospective profits		19,940 00					
		12,815 60					
We add wages of 27 men for 10 months	11,150 00						
Effects not included in the claim	3,200 00						
		14,350 00					
			27,165 60				
Page 25.—Benjamin Tucker—348 68-95 tons		179,835 06					
We deduct prospective profits		100,800 00					
		79,035 06					
Claims are presented for only 26-32 of the value of this vessel; we therefore add 6-26 of $70,200, in order to complete the claim		16,200 00					
		95,235 06					
We add wages of 30 men for 25 months	29,375 00						
Personal effects not included in the claim	3,000 00						
		32,375 00					
			127,610 06		$7,000 00		

CLASS A.—ALABAMA—Continued.

Detailed statement.			Total amount of claims, including those of owners and insurers, but not including those for profits purely prospective and losses arising from the breaking up of voyages.	Claims for insurance, the amounts of which are expressly stated in the claim, and which must be added to the loss of the owners, including cases in which the owners make no claim for insurance.	Claims for insurance, concerning which the Tribunal will decide whether they are to be considered as included in the claims of the owners.	Claims for insurance, in which the owners protest against any reduction of their claim on account of insurance.	Remarks.
1			2	3	4	5	6
Page 30.—Courser—121 tons		$33,307 53					No insurance. The Tribunal will decide concerning the item of $19,845, for loss of cargo and damages.
We deduct for error in the addition		1,000 00					
		32,307 53					
We add wages of 27 men for 13 months	$14,495 00						
Personal effects not included in the claim	3,950 50						
		18,445 00					
			$50,752 53				
Page 35.—Elisha Dunbar—257 10-95 tons		150,894 65					
We deduct loss caused by breaking up of voyage		88,200 00					
		62,964 65					
We add wages of 27 men for 7 months	7,805 00						
Personal effects not included in the claim	3,700 00						
		11,505 00					
			74,199 65		$21,375 00		
Page 51.—Kate Cory—132 6-95 tons		56,474 00					
We deduct loss of prospective profits		19,293 75					
		37,180 25					
We add wages of 27 men for 12 months	13,380 00						
Personal effects not included in the claim	3,200 00						
		16,580 00					
			53,760 25		8,212 00		
Page 53.—Kingfisher—120 8-95 tons		31,952 17					
We deduct prospective profits		12,600 00					
		19,352 17					
We add wages of 27 men for 26 months	28,990 00						

Personal effects of 27 men for 26 months	4,950 00					
		33,940 00				
			53,292 17		5,024 17	
Page 55.—Lafayette II—tonnage not stated		141,855 48				
We deduct loss of prospective profits	49,896 00					
Claim of William Lewis, presented twice	2,867 48					
		52,763 48				
		89,092 00				
We add wages of 27 men for 17 months	18,955 00					
Personal effects not included in the claim	3,700 00					
		22,655 00				
			111,747 00		20,025 00	
Page 59.—Levi Starbuck—376 3-95 tons		269,522 50				The Tribunal will decide concerning the following items: $75,000, cargo, $9,000, Getchell's claim; $7,000, Doud's claim. The insurance is probably not included in the claim of the owners.
We deduct loss caused by breaking up of voyage		114,312 50				
		155,210 00				
We add wages of 32 men for 7 months	8,505 00					
Personal effects not included in the claim	4,700 00					
		13,205 00				
			168,415 00		23,350 00	
Page 65.—Nye—211 tons		106,959 25				
We deduct loss caused by breaking up of voyage		18,900 00				
		88,059 25				
We add wages of 27 men for 15 months	16,725 00					
Personal effects not included in the claim	3,200 00					
		19,925 00				
			107,974 25		24,852 00	
Page 68.—Ocean Rover—313 32-95 tons		193,866 03				The arbitrators may decide whether there is a double claim for re-insurance amounting to $1,605.
We deduct prospective profits	37,800 00					
We deduct for error in the addition, (insurance)	24,710 00					
		62,510 00				
		131,356 03				
We add wages of 28 men for 9 months	10,215 00					
Personal effects not included in the claim	3,700 00					
		13,915 00				
			145,271 03		30,315 00	
Page 70.—Ocmulgee—459 tons		419,985 00				The Tribunal will decide concerning the item of $135,000, loss on merchandise.
We deduct loss of prospective profits		165,510 00				
		254,475 00				
We add wages of 38 men for 8 months	10,680 00					
Personal effects not included in the claim	4,350 00					
		15,030 00				
			269,505 00			

CLASS A.—ALABAMA—Continued.

Detailed statement.			Total amount of claims, including those of owners and insurers, but not including those for profits purely prospective and losses arising from the breaking up of voyages.	Claims for insurance, the amounts of which are expressly stated in the claim, and which must be added to the loss of the owners, including cases in which the owners make no claim for insurance.	Claims for insurance, concerning which the Tribunal will decide whether they are to be considered as included in the claims of the owners.	Claims for insurance, in which the owners protest against any reduction of their claim on account of insurance.	Remarks.
1			2	3	4	5	6
Page 115.—Virginia—346 34-95 tons		$167,500 00					
We deduct loss of prospective profits		103,950 00					
		63,550 00					
We add wages of 30 men for 7 months	$8,225 00						
Personal effects	5,250 00						
		13,475 00					
			$77,025 00			$13,550 00	
Page 117.—Weather Gage—106 72-95 tons		30,445 54					No insurance.
We deduct loss caused by breaking up of voyage	18,900 00						
We deduct claim of Atkins	800 00						
		19,700 00					
		10,745 54					
We add wages of 27 men for 8 months	8,920 00						
Personal effects not included in the claim	3,850 00						
		12,770 00					
			23,515 54				
			1,335,046 99				
			20,760 00				
After the deduction of $20,760, which was added by mistake as wages, the total amount of claims is			1,314,286 99	$13,300 00	$140,133 17	13,350 00	

CLASS B.—ALABAMA.

Detailed statement.			Total amount of claims, including wages and personal effects of crew.	Claims for insurance, the amounts of which are expressly stated in the claim, and which must be added to the loss of the owners, including cases in which the owners make no claim.	Claims for insurance to be submitted to the Tribunal, which will decide whether they are to be considered as included in the claims of the owners or not.	Claims for insurance, in which the owners protest against any reduction of their claims on account of insurance.	Remarks.
1			2	3	4	5	6
Page 26.—Brilliant—839 21-95 tons		$125,212 83					No estimate is made of the value of the captain's personal effects.
We add wages for 31 men for 7 months	$6,195 00						
Personal effects not included in the claim	4,050 00						
		10,245 00					
			$135,457 83	$1,975 00	$7,215 00		
Page 27.—Charles Hill—699 tons		46,634 93					No insurance. No estimate is made of the value of the captain's personal effects.
We add wages of 26 men for 8 months	6,280 00						
Personal effects not included in the claim	3,550 00						
		9,830 00					
			56,464 93				
Page 28.—Conrad—347 89-95 tons		94,241 00					Observe the claim of the Columbian Insurance Company for re-insurance, $17.
We add wages of 15 men for 9 months	3,955 00						
Personal effects	3,450 00						
		7,405 00					
			101,646 00	47,205 00	6,570 00		
Page 31.—Crenshaw—278 60-95 tons		27,474 49					No insurance.
We add wages of 13 men for 7 months	3,675 00						
Personal effects	3,250 00						
		6,925 00					
			34,399 49				
Page 38.—Express—1,072 tons		88,870 00					No estimate is made of the value of personal effects belonging to first officer or of the amount of his pay.
We add wages of 39 men for 10 months, not including pay of first officer for 6 months	9,850 00						
Personal effects not included in the claim	5,100 00						
		14,950 00					
			103,820 00				
Page 40.—Golden Eagle—1,120 82-95 tons		114,687 50					No insurance. No estimate is made of the value of the captain's personal effects.
We add wages of 40 men for 9 months	9,585 00						
Personal effects not included in the claim	4,950 00						
		14,535 00					
			129,222 50				

CLASS B.—ALABAMA—Continued.

Detailed statement.			Total amount of claims, including wages and personal effects of crew.	Claims for insurance, the amounts of which are expressly stated in the claim, and which must be added to the loss of the owners, including cases in which the owners make no claim.	Claims for insurance to be submitted to the Tribunal, which will decide whether they are to be considered as included in the claims of the owners or not.	Claims for insurance, in which the owners protest against any reduction of their claims on account of insurance.	Remarks.
1			2	3	4	5	6
Page 47.—Jabez Snow—1,073 32-95 tons		$146,208 00					No estimate is made of the value of the captain's personal effects or of the amount of his pay.
We deduct loss of charter, partly agreed upon and entered into		54,000 00					
		92,208 00					
We add wages of 39 men for 8 months, exclusive of the half of 6 months' pay allowed the captain	$7,460 00						
Personal effects not included in the claim	4,850 00						
		12,310 00					
		126,800 50	$104,518 00		$6,203 00		
Page 49.—John A. Parks—1,046 42-95 tons							No estimate is made of the value of the personal effects or of the amount of pay of the first officer and 3 seamen.
We add wages of 38 men for 7 months, not including the half of 6 months' pay allowed the first officer and 3 seamen	6,215 00						
Personal effects not included in the claim	4,700 00						
		10,915 00					
		121,795 10	137,715 50	$58,201 00			
Page 54.—Lafayette—945 tons							No insurance. No estimate is made of the value of the personal effects of the captain and first officer.
We add wages of 35 men for 7 months	6,755 00						
Personal effects not included in the claim	3,700 00						
		10,455 00					
		27,950 00	132,250 10				
Page 57.—Lamplighter—365 tons							No estimate is made of the value of the personal effects of John Payne, (second officer?)
We add wages of 15 men for 7 months	3,955 00						
Personal effects not included in the claim	2,950 00						
		6,905 00					
		85,350 00	34,855 00	8,000 00	450 00		
Page 61.—Louisa Hatch—853 67-95 tons							No insurance. No estimate is made of

We add wages of 31 men for 7 months	6,195 00						the value of the captain's personal effects.
Personal effects not included in the claim	4,050 00						
		10,245 00					
			95,625 00				
Page 73.—Palmetto—172 tons		22,833 33					No estimate is made of the amount of pay or of the value of the personal effects of the captain.
We add wages for 13 men for 7 months, exclusive of the 6 months' pay allowed the captain	2,775 00						
Personal effects	2,250 00						
		5,025 00					
			27,858 33	12,400 00			
Page 74.—Rockingham—976 tons		235,455 55					Observe the captain's claim for his share of commission on the cargo. No claim is made for the insurance on the captain's personal effects, $3,500. No estimate is made of the value of the captain's personal effects or of the amount of his pay.
We deduct the claim of the owners for insurance in the Atlantic Mutual Insurance Company, since this is included in the claim itself		50,000 00					
		185,455 55					
We also deduct insurance premium		7,031 50					
		178,424 05					
We add wages of 36 men for 8 months, not including pay of captain	6,980 00						
Personal effects not included in the claim	4,550 00						
		11,530 00					
			189,954 05				
Page 88.—S. Gildersleeve—847 55-95 tons		35,000 00					
We add wages of 31 men for 9 months	7,965 00						
Personal effects	5,050 00						
		13,015 00					
			48,015 00	35,000 00			
Page 116.—Wave Crest—408 83-95 tons		59,264 10					No estimate is made of the value of the personal effects of the captain and steward or of the amount of their pay.
We add wages of 17 men for 7 months, not including pay of captain and steward	3,215 00						
Personal effects not included in the claim	2,150 00						
		5,365 00					
			64,629 10				
			1,396,430 83	259,081 00	79,465 00		

CLASS C.—ALABAMA.

Page 7.—Amanda—508 3-95 tons		$69,853 01					No estimate is made for the personal effects of the captain and first officer nor for the captain's pay.
We add wages of 23 men for 11 months	$6,325 00						
Personal effects not included in the claim	2,500 00						
		8,825 00					
			$78,678 01	$2,500 00			

CLASS C.—ALABAMA—Continued.

Detailed statement.			Total amount of claims, including wages and personal effects of crew.	Claims for insurance, the amounts of which are expressly stated in the claim, and which must be added to the loss of the owners, including cases in which the owners make no claim for insurance.	Claims for insurance to be submitted to the Tribunal, which will decide whether they are to be considered as included in the claims of the owners or not.	Claims for insurance, in which the owners protest against any reduction of their claims on account of insurance.	Remarks.
1			2	3	4	5	6
Page 8.—Amazonian—480 tons		$136,702 82					No estimate is made of the value of the personal effects of the captain or of the mate. Charter-party.
We add wages of 19 men for 8 months	$5,160 00						
Personal effects not included in the claim	1,750 00						
		6,910 00					
			$143,612 82	$50,883 00	$36,544 00		
Page 13.—Anna F. Schmidt—784 tons		294,654 49					Observe the claim of $20,000 for re-insurance. No estimate is made of the value of the personal effects of the captain or mate.
We add wages of 29 men for 12 months	10,140 00						
Personal effects not included in the claim	3,750 00						
		13,890 00					
			308,544 49	211,463 00			
Page 29.—Contest—1,098 tons		142,865 97					No estimate is made of the value of the captain's personal effects.
We add wages of 40 men for 10 months	10,650 00						
Personal effects not included in the claim	4,950 00						
		15,600 00					
			158,465 97	100,009 00			
Page 32.—Dorcas Prince—700 tons		59,814 60					No estimate is made of the value of the captain's personal effects.
We add wages of 26 men for 8 months	6,280 00						
Personal effects not included in the claim	3,550 00						
		9,830 00					
			69,644 60	55,026 00			
Page 34.—Dunkirk—293 38-95 tons		51,285 56					No estimate is made for the personal effects of the captain and first officer nor of the captain's pay.
We add wages of 13 men for 7 months	2,625 00						
Personal effects not included in the claim	1,500 00						
		4,125 00					
			55,410 56	21,250 00		$8,000 00	
Page 41.—Golden Rule—254 70-95 tons		91,015 70					No estimate is made for the personal effects of the captain and mate.
We add wages of 13 men for 7 months	3,675 00						
Personal effects not included in the claim	2,150 00						
		5,825 00					
			96,840 70	34,794 00			

Page 58.—Lauretta—284 tons		30,339 64					
We add wages of 13 men for 7 months	3,675 00						
Personal effects	3,250 00						
		6,925 00					
		57,962 75	37,264 64	12,200 00			No estimate is made of the value of the captain's personal effects.
Page 63.—Martaban—707 92-100 tons							
We add wages of 27 men for 10 months	8,050 00						
Personal effects not included in the claim	3,650 00						
		11,700 00					
		92,028 66	69,662 75				No estimate is made for the pay and personal effects of the captain.
Page 71.—Olive Jane—359 90-95 tons							
We add wages of 15 men for 7 months	2,905 00						
Personal effects not included in the claim	2,450 00						
		5,335 00					
		26,064 56	97,383 66	10,261 66			No estimate is made for the captain's pay after the capture of the vessel.
Page 73.—Parker Cook—136 tons							
We add wages of 13 men for 7 months	2,775 00						
Personal effects not included in the claim	2,250 00						
		5,025 00					
		146,594 12	31,089 56	25,399 00			No estimate is made for the captain's personal effects nor for his pay after the capture of the vessel.
Page 76.—Sea Bride—447 2-95 tons							
We add wages of 18 men for 12 months	6,600 00						
Personal effects not included in the claim	2,750 00						
		9,350 00					
		233,355 00	135,944 12		20,000 00	37,000 00	No estimate is made for the personal effects and pay of the second officer.
Page 91.—Talisman—1,237 tons							
We add wages of 44 men for 8 months	8,560 00						
Personal effects not included in the claim	5,850 00						
		14,410 00					
		366,055 14	247,765 00	115,500 00	20,000 00	16,000 00	No estimate is made for the captain's personal effects.
Page 78.—Sea Lark—973 tons							
We deduct for error in adding		54,500 00					
		311,555 14					
We add wages for 35 men for 8 months	7,720 00						
Personal effects not included in the claim	4,450 00						
		12,170 00					
		230,786 24	323,725 14	120,899 00	21,000 00		No estimate is made for the personal effects of the captain and first officer.
Page 95.—Thomas B. Wales—599 59-95 tons							
We add wages of 23 men for 11 months	7,975 00						
Personal effects not included in the claim	2,500 00						
		10,475 00					
		447,399 38	241,261 24	168,370 84	5,000 00		Observe the claim for $346,499 as commission, and that of William H. Battelle for $10,000, on account of losses, imprisonment, &c. No estimate is made for the personal effects of the captain nor for his pay after the capture of the vessel.
Page 99.—Tycoon—717 46-95 tons							
We add wages of 27 men for 8 months	5,540 00						
Personal effects not included in the claim	3,650 00						
		9,190 00					
			456,589,38	189,469 00	16,755 00		

CLASS C.—ALABAMA—Continued.

Detailed statement.			Total amount of claims, including wages and personal effects of crew.	Claims for insurance, the amounts of which are expressly stated in the claim, and which must be added to the loss of the owners, including cases in which the owners make no claim.	Claims for insurance to be submitted to the Tribunal, which will decide whether they are to be considered as included in the claims of the owners or not.	Claims for insurance, in which the owners protest against any reduction of their claims on account of insurance.	Remarks.
1			2	3	4	5	6
Page 110.—Union Jack—482 81-95 tons		$172,234 63					No estimate is made for the personal effects and pay of the captain.
We add wages of 19 men for 8 months	$3,960 00						
Personal effects not included in the claim	2,850 00						
		6,810 00					
			$179,044 63	$33,763 00	$10,000 00	$8,000 00	
Page 118.—Winged Racer—1,767 44-95 tons		365,767 91					No estimate is made for the personal effects of the captain and officers nor for the captain's pay.
We add wages of 62 men for 10 months	13,700 00						
Personal effects not included in the claim	6,400 00						
		20,100 00					
			385,867 91		21,000 00		
Page 62.—Manchester—1,062 tons		161,155 92					No estimate is made for the captain's personal effects.
We add wages of 38 men for 7 months	7,175 00						
Personal effects not included in the claim	4,750 00						
		11,925 00					
			173,080 92	62,500 00			
			3,309,876 10	1,234,278 50	150,299 00	69,000 00	

CLASS D.—ALABAMA.

Page 28.—Chastelaine—293 tons		$11,670 55					No estimate is made for the captain's personal effects.
We add wages of 13 men for 7 months	$3,675 00						
Personal effects not included in the claim	2,250 00						
		5,925 00					
			$17,595 55	$11,670 55			
Page 37.—Emma Jane—1,096 42-95 tons		86,557 34					In this case no estimate has been made of the pay of the officers or crew.
We add wages of 40 men for 10 months							

Personal effects not included in the claim							Observe the claim (which may be double) for $1,452, for the captain's personal effects.
			86,557 34	29,000 00			
Page 46.—Highlander—1,049 56-95 tons		191,171 00					No estimate is made for the captain's personal effects.
We add wages of 38 men for 10 months	10,250 00						
Personal effects not included in the claim	4,750 00						
		15,000 00					
			206,171 00		$36,000 00		
Page 89.—Sonora—707 63-95 tons		94,514 44					No estimate is made for the personal effects of the captain and first officer nor for their pay after the capture of the vessel.
We add for wages of 27 men for 10 months	5,550 00						
Personal effects not included in the claim	2,900 00						
		8,450 00					
			102,964 44	30,000 00			
			413,218 33	70,670 55	36,000 00		

Class E and F.—Alabama.

Page 24.—Ariel—steamer		$10,423 38					After goods had been taken from this vessel it was released, on a written promise of the payment of a ransom.
			$10,423 38	$8,500 00			
Page 51.—Justina		7,000 00					This claim is for capture and breaking up of voyage.
			7,000 00				
Page 64.—Morning Star		5,614 40					For damage resulting from bond given after capture of Morning Star.
			5,614 40				
Page 65.—Nora		83,500 00					No estimate is made for the personal effects or pay of the captain.
We add for wages of 12 men for 7 months	$2,275 00						
Personal effects not included in the claim	2,250 00						
		4,525 00					
			88,025 00		$20,000 00		
Page 90.—Star Light		6,520 00					No estimate is made of the value of the captain's personal effects nor of the amount of the pay of more than five men besides the officers.
We add for wages of 8 men for 7 months	2,975 00						
Personal effects not included in the claim	1,750 00						
		4,725 00					
			11,245 00				
Page 24.—Baron de Castine		1,500 00					This vessel was bonded and used as a cartel-ship.
			1,500 00				
			123,807 78	8,500 00	20,000 00		

CLASS A.—SHENANDOAH.

Detailed statement.		1	Total amount of claims, including those of owners and insurers, but not including those for profits purely prospective and losses caused by breaking up of voyages. 2	Claims for insurance whose amounts are expressly stated in the claim, and which must be added to the loss of the owners, including cases in which the owners make no claim for insurance. 3	Claims for insurance in regard to which the Tribunal will decide whether they are to be considered as included in the claims of the owners or not. 4	Claims for insurance in which the owners protest against any reduction of their claim on account of insurance. 5	Remarks. 6
Page 225.—Abigail—309 75-95 tons		$254, 695 99					No insurance.
We deduct loss resulting from breaking up of voyage		169, 849 20					
		84, 846 79					
We add wages of 28 men for 11 months	$12, 485 00						
Personal effects	3, 200 00						
		15, 685 00					
		100, 531 79	$100, 531 79				
Page 227.—Brunswick—295 5-95 tons		126, 284 50					
We deduct loss of prospective profits		38, 625 00					
		87, 659 50					
We add wages of 27 men for 11 months	12, 265 00						
Personal effects	3, 950 00						
		16, 215 00					
		103, 874 50	103, 874 50			$24, 200 00	
Page 229.—Catharine—384 42-95 tons		272, 108 32					Observe the claim of James J. O'Donnell for $3,800 on account of loss of personal effects, interest in cargo, and prospective catch.
We deduct loss of prospective profits	104, 553 91						
Do	49, 201 87						
Do	43, 051 64						
		196, 807 42					
		75, 300 90					
We add wages of 33 men for 12 months	14, 820 00						
Personal effects	3, 550 00						
		18, 370 00					
		93, 670 90	93, 670 90	$31, 676 00			
Page 232.—Congress—376 tons		184, 902 00					
We deduct loss of prospective profits		53, 075 00					

		131, 827 00					
We add wages of 32 men for 34 months	41, 310 00						
Personal effects not included in the claim	4, 450 00						
		45, 760 00					
Page 233.—Covington—350 25-95 tons		127, 964 40	177, 587 00		$41, 000 00		
We deduct loss of prospective profits		61, 506 90					
		66, 457 50					
We add wages of 30 men for 17 months, deducting those of captain and one seaman	18, 445 00						
Personal effects not included in the claim	3, 900 00						
		22, 345 00					
Page 237.—Edward—274 14-95 tons		209, 681 00	88, 802 50	15, 000 00			
We deduct loss for breaking up of voyage		151, 100 00					
		58, 581 00					
We add wages of 27 men for 13 months	14, 495 00						
Personal effects	4, 950 00						
		19, 445 00					
Page 238.—Edward Carey—353 27-95 tons		121, 382 70	78, 026 00			19, 875 00	
We deduct loss of prospective profits		66, 600 00					No insurance. Observe the captain's claim for $10,000 on account of damages.
		54, 782 70					
We add wages of 31 men for 12 months, not including one-half of Captain Baker's pay	13, 665 00						
Personal effects not included in the claim	3, 600 00						
		17, 265 00					
Page 238.—Euphrates—364 40-95 tons		181, 651 50	72, 047 70				Observe the captain's claim for loss on cargo.
We deduct loss caused by breaking up of voyage		100, 875 00					
		80, 776 50					
We add wages of 31 men for 11 months, not including one-half of captain's pay	12, 470 00						
Personal effects	3, 600 00						
		16, 070 00					
Page 240.—Favorite—tonnage not stated		240, 978 44	96, 846 50			9, 750 00	Observe the captain's claim for $2,709.04 for loss of his share of oil, and that of Brian, 3d officer, for his interest in prospective catch.
We deduct loss caused by breaking up of voyage		87, 250 00					
		153, 728 44					
We add wages of 27 men for 11 months	12, 265 00						
Personal effects	3, 700 00						
		15, 965 00					
			169, 693 44			50, 000 00	

CLASS A.—SHENANDOAH—Continued.

Detailed statement.		1	Total amount of claims, including those of owners and insurers, but not including those for profits purely prospective and losses caused by breaking up of voyages. 2	Claims for insurance whose amounts are expressly stated in the claim, and which must be added to the loss of the owners, including cases in which the owners make no claim for insurance. 3	Claims for insurance in regard to which the Tribunal will decide whether they are to be considered as included in the claims of the owners or not. 4	Claims for insurance in which the owners protest against any reduction of their claim on account of insurance. 5	Remarks. 6
Page 241.—General Williams—419 33-95 tons		$406,934 75					
We deduct loss of prospective profits	$196,807 50						
Do	20,000 00						
Do	10,000 00						
		226,807 50					
		180,127 25					
We deduct for error in adding		89,346 40					
		90,780 85					
We add wages of 35 men for 15 months	19,125 00						
Personal effects	4,000 00						
		23,125 00					
		152,772 75	$113,905 85	$44,673 20	$4,118 80		
Page 243.—Gipsey—360 8-95 tons							
We deduct loss of prospective profits	49,075 00						
We deduct insurance, because the owners only claim the loss sustained over and above the insurance	24,000 00						
		73,075 00					
		79,697 75					
We add wages of 31 men for 13 months, not including pay of 2d mate	12,160 00						
Personal effects	3,600 00						
		15,760 00					
		95,457 75	24,000 00				
Page 244.—Hector—360 42-95 tons		203,910 80					
Prospective profits to be deducted		99,750 00					
		104,160 80					
We add wages of 32 men for 14 months	17,010 00						

Personal effects of 32 men for 14 months.....	4,450 00						
		21,460 00					
Page 245.—Hillman—382 84-95 tons		158,176 75	125,620 80	.....	.....	$31,875 00	
We deduct prospective profits.....	54,675 00						
Do	545 25						
		55,220 25					
		102,956 50					
We add wages of 33 men for 41 months, not including one-half of 9 months' pay allowed the captain	49,960 00						
Personal effects.....	4,450 00						
		54,410 00					
			157,366 50	.....	31,250 00		
Page 246.—Isaac Howland—399 29-95 tons.....		383,149 00	.....	.....	.....	.....	Observe the claim of two insurance companies for the same amount--$14,000—for insurance.
We deduct prospective profits.....		196,158 00					
		186,991 00					
We add wages of 34 men for 12 months.....	15,060 00						
Personal effects.....	3,900 00						
		18,960 00					
			205,951 00	.....	.....	55,500 00	
Page 248.—Isabella—315 6-95 tons.....		297,237 00					
We deduct prospective profits.....		174,600 00					
		122,637 00					
We add wages of 28 men for 30 months.....	34,050 00						
Personal effects.....	3,300 00						
		37,350 00					
			159,987 00	.....	1,000 00	21,650 00	
Page 250.—Jireh Swift—454 7-95 tons		225,880 75					
We deduct prospective profits.....		138,087 50					
		87,793 25					
We add wages of 37 men for 12 months.....	15,780 00						
Personal effects of 37 men	3,700 00						
		19,480 00					
			107,273 25				
Page 253.—Martha—359 77-95 tons		303,858 98					
Loss caused by breaking up of voyage to be deducted		192,062 50					
		111,796 48					
The claim for this vessel is only represented by 31-32; we therefore add 1-32 of $69,906.25 in order to complete the claim		2,253 04					
		114,051 52					
We add wages of 31 men for 12 months, not including one-half of the 9 months' pay allowed the captain and the 1st and 2d mates.	12,877 50						
Personal effects of 31 men	2,850 00						
		15,727 50					
			129,779 02	.....	.....	34,200 00	

CLASS A.—SHENANDOAH—Continued.

Detailed statement.		1	Total amount of claims, including those of owners and insurers, but not including those for profits purely prospective and losses caused by breaking up of voyages. 2	Claims for insurance whose amounts are expressly stated in the claim, and which must be added to the loss of the owners, including cases in which the owners make no claim for insurance. 3	Claims for insurance in regard to which the Tribunal will decide whether they are to be considered as included in the claims of the owners or not. 4	Claims for insurance in which the owners protest against any reduction of their claims on account of insurance. 5	Remarks. 6
Page 255.—Nassau—407 63-95 tons		$241, 574 50					
Loss arising from breaking up of voyage to be deducted		78, 750 00					
		162, 824 50					
We add wages of 34 men for 11 months	$13, 805 00						
Personal effects	4, 650 00						
		18, 455 00					
		276, 499 87	$181, 279 50			$72, 500 00	
Page 258.—Nimrod—340 67-95 tons							
We deduct loss caused by breaking up of voyage	154, 500 00						
Loss of first officer	4, 000 00						
		158, 500 00					
		117, 999 87					
We add wages of 30 men for 35 months	41, 125 00						
Personal effects not included in claim	3, 000 00						
		44, 125 00					
		140, 284 31	162, 124 87			28, 000 00	
Page 260.—Sophia Thornton—426 80-95 tons							
We deduct loss of prospective profits		51, 100 00					
We add wages of 35 men, not including one-half of the 9 months' pay allowed the first officer	13, 575 00						
Personal effects not included in the claim	4, 000 00						
		17, 575 00					
		227, 848 37	106, 739 31			27, 050 00	
Page 262.—Susan Abigail—159 9-95 tons							No insurance.
We deduct loss of prospective profits	95, 975 00						
We deduct loss of prospective trade	88, 750 00						

		184, 725 00				
		43, 123 37				
We add wages of 27 men for 8 months	8, 920 00					
Personal effects	4, 950 00					
		13, 870 00				
			56, 993 37			
Page 263.—Waverly—327 8-95 tons		298, 513 25				
Loss on prospective profits to be deducted		110, 876 00				
		117, 637 25				
We add wages of 29 men for 12 months	13, 860 00					
Personal effects not included in the claim	4, 150 00					
		18, 018 00				
			135, 655 25			31, 250 00
Page 264.—William Thompson—495 43-95 tons		290, 843 75				
We deduct loss of prospective profits		131, 250 00				
		159, 593 75				
We add wages of 40 men for 11 months	15, 125 00					
Personal effects of 40 men	6, 250 00					
		21, 375 00				
			180, 968 75			54, 500 00
Page 265.—William C. Nye—389 35-95 tons		305, 837 50				
We deduct loss of prospective profits	218, 125 00					
We deduct captain's claim for breaking up of voyage	5, 000 00					
		223, 125 00				
		82, 712 50				
We add wages of 33 men for 9 months	11, 115 00					
Personal effects not included in claim	4, 550 00					
		15, 665 00				
			98, 377 50		20, 000 00	
Page 259.—Pearl—195 tons		110, 240 50				
We deduct loss of prospective profits	60, 890 00					
We deduct for errors in adding	10, 000 00					
		70, 890 00				
We add wages of 27 men for 12 months, not including 9 months' pay allowed to the first officer and to a seaman	12, 705 00	39, 350 50				
Personal effects not included in claim	3, 600 00					
		16, 305 00	55, 665 50			
			3, 054, 235 55			
			46, 560 00			
After deducting $46,560, which we have added by mistake as wages, the total amount of claims is			3, 007, 675 55	$115, 349 20	97, 368 80	460, 350 00

CLASS B.—SHENANDOAH.

Detailed statement.		1	Total amount of claims, including those of owners and insurers, but not including those for profits purely prospective and losses caused by breaking up of voyages. 2	Claims for insurance whose amounts are expressly stated in the claim, and which must be added to the loss of the owners, including cases in which the owners make no claim for insurance. 3	Claims for insurance in regard to which the Tribunal will decide whether they are to be considered as included in the claims of the owners or not. 4	Claims for insurance in which the owners protest against any reduction of their claims on account of insurance. 5	Remarks. 6
Page 226.—Alina—573 86 95 tons		$90, 317 43					No estimate is made for the effects and pay of the captain.
We add wages of 27 men for 7 months, not including captain's pay	$4, 035 00						
Personal effects not included in the claim	3, 150 00						
		$7, 185 00					
			$97, 502 43	$3, 500 00			
Page 262.—Susan—134 tons		14, 952 00					No estimate is made for the effects and pay of the first officer.
We add wages of 13 men for 8 months, not including those of one officer	3, 600 00						
Personal effects not included in the claim	2, 500 00						
		6, 100 00					
			21, 052 00				
Total			118, 554 43	3, 500 00			

CLASS C.—SHENANDOAH.

Page 235.—D. Godfrey—299 tons		$70, 988 00					No estimate is made of the value of the personal effects of the captain or of the amount of his pay after the capture of the vessel.
We deduct loss on sale of vessel	$13, 290 00						
Insurance premium	460 00						
		13, 750 00					
		57, 238 00					
We add wages of 13 men for 8 months	3, 300 00						
Personal effects not included in the claim	2, 250 00						
		5, 550 00					
			$62, 788 00	$47, 085 00			

Page 251.—Lizzie M. Stacey—140 24-95 tons		42, 257 50					No estimate is made of the value of the personal effects of the captain and of one seaman, nor of the amount of the captain's pay after the capture of the vessel.
We add wages of 13 men for 8 months	3, 300 00						
Effects not included in the claim	2, 150 00						
		5, 450 00					
			47, 707 50	23, 600 00			
Page 230.—Charter Oak—(tonnage not stated)		32, 689 56					According to all appearances, all claims relating to this vessel have not yet been presented. The Tribunal will decide whether a double claim for the same amount, viz, $3,500 as insurance, has been presented. No estimate is made for the captain's personal effects.
We add wages of 13 men for 8 months	4, 200 00						
Personal effects not included in the claim	2, 250 00						
		6, 450 00					
			39, 139 56	31, 400 00			
Total			149, 635 06	106, 485 00			

CLASS D.—SHENANDOAH.

Page 234.—Delphine—705 35-95 tons		$93, 925 00					No estimate is made for the personal effects and pay of the captain and mate, nor for their pay after the capture of the vessel.
We add wages of 26 men for 12 months	$10, 350 00						
Personal effects not included in the claim	2, 800 00						
		13, 150 00					
			$107, 075 00		$9, 000 00		
Total			107, 075 00		9, 000 00		

Shenandoah, supplement, Class A.

Page 266.—Almira—360 tons Page 266.—Europa—360 tons Page 241.—General Pike—313 15-95 tons Page 250.—James Maury—394 64-95 tons Page 255.—Milo—410 2-95 tons Page 257.—Nile—360 tons Page 266.—Richmond—tonnage not stated Page 266.—Splendid—360 tons	We estimate the value of each of these vessels at $80,000, and we allow 25 per cent. loss on account of breaking up of voyage	$20, 000 00
	We estimate the wages of the crew according to the tonnage of the vessels, at least at	12, 000 00
	And we add, moreover, for the maintenance of the captured crew and port charges	5, 000 00
		37, 000 00
	Total for these 8 vessels	296, 000 00
Page 227.—Australia, loss on account of forced sale		22, 500 00
Page 266.—Louisiana, loss arising from breaking up of voyage		15, 000 00
		333, 500 00

NOTE.—This table as originally presented showed a total of $973,500; but as was explained in the statement read by Mr. Bancroft Davis to the Tribunal on the 26th of August, and contained in the 26th protocol, it was a clerical error. The table is therefore given here in the corrected form.

XIV.—TABLES PRESENTED BY THE AGENT OF HER BRITANNIC MAJESTY ON THE 19TH OF AUGUST, 1872, IN COMPLIANCE WITH THE REQUEST OF THE TRIBUNAL.

PRELIMINARY STATEMENT.

In presenting the subjoined tables to the Tribunal, as required by the Arbitrators, the Agent of Her British Majesty has the honor to present the following points as deserving their attention:

I. Great Britain should not be considered bound to make compensation to the United States for the sum *total* of the losses occasioned by any of the cruisers in regard to which the Tribunal may be of the opinion that there was remissness in the performance of duty on the part of Great Britain.

II. The following principles should be observed in estimating the amount of compensation:

A. All *double claims for simple losses* should be rejected; such, for example, as claims presented simultaneously by owners and insurance companies, simultaneous claims for loss of freight and loss of charter-party, and other similar claims mentioned on pages 10 and 11 of volume VII of the British Appendix, and which amount to a very considerable sum.

B. Claims for prospective gross losses of whalers should be rejected, for the reasons stated on pages 12, 13, 26, and 27 of volume VII of the Appendix. It is, indeed, not even attempted to sustain these claims in the Argument of the United States; they should, therefore, be considered as virtually abandoned.

C. It is impossible, for the reasons stated on page 13 of the same volume, to admit the claims for gross acquired profits without any of the necessary deductions.

D. Claims for *gross* freights of merchant-vessels should be rejected, for the reasons stated *in extenso* on pages 14, 15, 16, and 17 of the same volume. It will be seen that it is not even attempted to sustain them in the Argument of the United States, and they should therefore be considered as virtually abandoned.

E. Profits which it was expected to gain on merchandise in the ports to which the vessels were bound are not, for the reasons stated on page 17 of the same volume, a proper subject of compensation.

F. The reasons stated on the pages aforesaid of the same volume of the British Appendix, as well the firmly-established principles of jurisprudence, which are recognized by the courts of the United States, England, and other countries, require, as a suitable means of compensating claimants for the loss of vessels, outfits, profits, and freights, that they should be allowed the full original value of these vessels and of these outfits at the beginning of each voyage, and that they should, moreover, be allowed so much per cent. of this value, together with a sum for wages, to be calculated from the beginning of each voyage up to the day of the capture, as has been stated on pages 13 to 17 and 26 to 29 of volume VII of the Appendix.

G. The proper method of indemnifying the claimants for the loss of

their merchandise, and of the profits which they expected to realize, would be to allow them the value of such merchandise at the port of shipment, together with the interest on this same value, calculating from the commencement of the voyage up to the time of the capture.

III. It is impossible, for the reasons stated on page 17 of the aforementioned volume, to trust to the value placed by the claimants themselves upon their property; and, after having applied the above principles, it will be proper to make a suitable deduction from these claims, in order to reduce them to the sum to which they would be reduced if they were referred to assessors, or to the sum to which the Government of the United States would reduce them, in case, a gross sum having been allowed, this Government were to distribute it to the claimants.

IV. The necessity of this new reduction will appear from the following considerations:

A. The United States now admit that these claims have never been carefully sifted. It is hardly necessary to call attention to the capital importance of this admission.

B. It has been clearly shown that the claims are exaggerated, and that the statement of the claims contains very considerable miscalculations.

C. The information furnished by the revised statement of the claims is not sufficient to permit the value of the property for which compensation is claimed to be estimated with sufficient certainty.

D. There is an entire absence of the ordinary documents which might prove the value of the merchandise and freights, such as bills of lading, manifests, policies of insurance, &c.; and, although it is asserted that these documents have been recorded at Washington, the Government of the United States has never compared them with the claims.

V. The amounts of the claims being almost always stated in paper money or paper dollars, and the ninth article of the Treaty requiring that the compensation should be allowed in gold, it is essential to establish the relative value of the paper dollar and of the gold dollar at the time when the claims were first prepared. It is evident, judging from the relative values stated in one or two of the claims, that this is a question of very considerable importance.

Table No. I gives a list of double claims prepared openly and expressly, and which are obvious to any one reading the statement even cursorily.

Table No. II gives a list of all the claims for gross prospective profits and gross freights in the case of the Alabama.

Table No. III contains an analysis of the claims connected with whaling-vessels captured by the Alabama; a note has been appended explaining the table.

Table No. IV contains an analysis of the claims connected with merchant-vessels captured by the Alabama.

Table No. V contains a recapitulation of the provisional claims and allowances connected with the Alabama; a brief explanation of these allowances has been added.

Table No. VI contains an analysis of the claims connected with the vessels captured by the Florida.

Table No. VII contains a recapitulation of the provisional claims and allowances connected with the Florida; a short explanation of these allowances has been added.

The following are the cases in which double claims or other unjust claims have been openly and designedly made in the statement. In almost all cases double claims are advanced tacitly or by implication. Some of these claims will be searched for and enumerated elsewhere.

TABLE No. I.—*List of double claims.*

Page of revised statement.	Name of vessel.	Amount.	Remarks.
....	Levi Starbuck ..	$23, 350	It is admitted that this sum should have been deducted for insurance received; it has, however, not been deducted.
....	.....	1, 000	Sum which Osgood & Co. admit that they received, but which they have not placed on the credit side of their account.
82	.....	2, 150	Sum equivalent to $1,565 in gold, which Mr. Rollins admits that he received, but which he does not place on the credit side of the account.
68	.....	49, 420	That is to say, twice $24,710, which sum it is admitted ought to be deducted, but which has been added.
80	Sea Lark.....	54, 500	Claim actually advanced twice by the same owners.
74	Rockingham....	50, 000	Double claim explained on page — of our first report.
76	Sea Bride.....	37, 000	Rufus, Greene & Co. refuse to place the sums received for insurance on the credit side of the account.
91	Talisman	16, 000	The owners acknowledge that they received this sum, but it is not placed on the credit side of their account.
111	Union Jack.....	8, 000	The owners claim the full value, without making allowance for the sums received for insurance, and the insurance companies claim it at the same time.
115	Virginia	13, 550	The owners claim the full value, without making allowance for the sums received for insurance, and the insurance companies claim it at the same time.
233	Martha	34, 280	
227	Brunswick.....	24, 200	The owners and insurance companies openly claim the sums at the same time.
237	Edward.....	19, 875	Do.
238	Euphrates	9, 750	Do.
240	Favorite	50, 000	Do.
243	Gipsey.....	94, 000	The necessity of deducting this sum is admitted, but it is not deducted.
244	Hector.....	31, 875	Double claim, as above.
247	Howland	69, 500	Do.
248	Isabella.....	22, 650	Do.
255	Nassau	72, 500	Do.
258	Nimrod.....	28, 000	Do.
260	S. Thornton	27, 050	Do.
263	Waverley.....	31, 250	Do.
264	W. Thompson...	54, 500	Do.
241	G. Williams.....	89, 346	The sum of $44,673 has been added here, instead of being deducted.
175	Golconda	25, 734	Double claim, as above.
	Total.....	869, 400	

TABLE No. II.—*Claims for gross freights and expected profits in the case of the Alabama.*

Page of revised statement.	Name of vessel.	Claim for—	Amount.	Remarks.
5	Alert	Loss by interruption of voyage.	$90, 000	
		Loss of probable catch.....	144, 868	A new claim presented in the revised statement.
6	Altamaha.....	.....do	19, 940	
7	Amanda	Loss of freight.....	33, 000	The value of the freight is not distinguished from that of the vessel.
8	Amazonian	Loss on charter-party.....	11, 000	
13	Anna Schmidt ..	Loss of freight.....	6, 360	$10,000 are also claimed as advances for the owners of the vessel.
		Insurance on charter-party.....	29, 000	
25	Benjamin Tucker.	Loss of expected profits	100, 800	See the original list, p. 434.
26	Brilliant	Loss of freight	16, 531	Do.
			18, 000	
27	Charles Hill.....	.....do	11, 733	
29	Contest.....	.....do	61, 500	See the first statement. A new claim presented in the revised statement.

TABLE No. II.—*Claims for gross receipts and expected profits, &c.*—Continued.

Page of revised statement.	Name of vessel.	Claim for—	Amount.	Remarks.
30	Courser	Loss by interruption of voyage.	$19,845	A new claim presented in the revised statement.
31	Crenshaw	Loss of freight	6,721	
32	Dorcas Prince	do	15,000	
34	Dunkirk	do	3,936	
35	E. Dunbar	Loss by interruption of voyage.	88,200	Claim increased in the revised statements.
37	Emma Lane	Loss of charter-party	26,438	
		Loss of the commission on charter-party.	1,324	
38	Express	Loss of freight, (at least)	31,129	The value of the freight is not distinguished from that of the vessel.
40	Golden Eagle	do	30,000	Do.
41	Golden Rule	Loss of freight	8,207	Do.
46	Highlander	do	68,402	
47	Jabez Snow	Loss of charter-party, (half agreed upon.)	9,408	Vessel in ballast. See first report, p. 9.
49	John A. Parks	Loss of charter-party	42,306	
51	Kate Cory	Loss of probable catch	19,294	
53	Kingfisher	do	12,600	
54	Lafayette	Loss of freight	18,978	
55	Lafayette 2d	Loss of probable catch	49,896	
57	Lamplighter	Loss of freight	8,780	
58	Lauretta	do	3,000	
59	Levi Starbuck	Loss of freight and prospective catch.	189,312	
61	Louisa Hatch	Loss of freight	15,000	
62	Manchester	do	15,000	
65	Nora	do	15,000	There is distinction made between the value of the freight and that of the vessel.
65	Nye	Loss of freight and prospective catch.	30,342	
68	Ocean Rover	do	37,800	
70	Ocmulgee	do	165,510	
71	Olive Jane	Loss of freight	15,000	
73	Parker Cook	do	1,625	
74	Rockingham	do	78,128	See the first report, pp. 23 and 24.
76	Sea Bride	do	21,000	There is distinction made between the value of the freight and that of the vessel.
78	Sea Lark	do	23,500	
89	Sonora	Loss of charter-party	33,244	
90	Starlight	Charter-party	1,720	
91	Talisman	Loss of freight	38,579	
95	T. B. Wales	do	15,165	
99	Tycoon	do	33,739	
110	Union Jack	do	6,600	
115	Virginia	Loss of freight and prospective catch.	103,950	
116	Wave Crest	Loss of freight	4,772	
117	Weather Gage	Loss by abandonment of voyage.	18,900	New claim presented in the revised statement.
118	Winged Racer	Loss of freight	24,000	The value of the freight is not separated from that of the vessel.
	Total		1,878,422	

Much more than the total claim prepared in relation to the Alabama.

The claims for expected profits amount, for the thirteen whalers, to $960,975, or to more than one-eighth of the entire claim prepared in relation to the Alabama.

TABLE No. III.—*Claims relative to whaling-vessels destroyed by the Alabama.**

Page.	Name of vessel.	Tonnage.	Number of days of voyage.	Claims for the vessel.		Claims for expected profit.		Claims for profits earned.		Claims for personal effects.		Claims for damages and sundries.		Total.
5	Alert	400	20		$27, 858		$174, 868							$202, 726
6	Altamaha	120	122		12, 000		19, 940				$816			32, 756
25	Benj. Tucker	350	129	Double claim.	59, 000 7, 000 45, 000		100, 800		$25, 200		1, 835			179, 835
31	Courser	125	189		12, 312		19, 845				150			32, 307
36	Elisha Dunbar	260	23	Double claim.	57, 375 21, 375 36, 000		88, 200		4, 095		1, 225			150, 895
52	Kate Corey	135	245	Double claim.	28, 212 8, 212 20, 000		19, 294		8, 268		720			56, 474
53	Kingfisher	120	184	Double claim.	16, 700 4, 700 12, 000		12, 600	Double claim.	2, 652 324 2, 328					31, 952
59	Levi Starbuck	380	5	Double claim.	63, 360 23, 350 40, 000		189, 312				860		$16, 000	269, 522
66	Nye	215	273	Double claim.	37, 660 7, 660 30, 000	Double claim.	30, 342 11, 442 18, 900	Double claim.	36, 934 5, 750 31, 184		2, 023			106, 959
68	Ocean Rover	315	1, 290	Double claim.	103, 025 53, 025 50, 000		37, 800	Double claim.	50, 825 2, 000 48, 825		2, 016			193, 666
70	Ocmulgee	460	215		40, 000		165, 510		77, 572		1, 903		135, 000	419, 985
113	Virginia	350	22	Double claim.	63, 550 13, 550 50, 000		103, 950							167, 500
55	Lafayette, 2d	310	330	Double claim.	40, 775 16, 775 24, 000		49, 896	Double claim.	48, 359 5, 068 43, 191	Double claim.	2, 326 1, 050 1, 276		500	141, 856

811	Weather Gage	110	36		10,053		18,900				692		800	30,445
				Gross claims	564,870		1,031,257		253,905		14,546		152,300	2,016,878
				Double claims	155,647		11,442		13,142		1,050			181,281
	Gross tonnage	3,650		Net claims	409,223		1,019,815		240,763		13,496		152,300	1,835,597

* The first column on the left shows the page of the revised statement where the claim is found. The second shows the name of the vessel to which the claim refers The third shows the tonnage of the vessel. The fourth shows how many days the vessel had been on its voyage. The fifth shows what is claimed for the vessel, its outfit and provisioning, including insurance. The sixth shows the claim for probable gross profits, including the insurance on the same. The seventh shows the claim for profits earned, including insurance on the same. The eighth shows the claim for personal effects presented by the captain or first mate. The ninth shows the amount claimed for wages and certain damages and losses which are not losses of property, together with the claims presented in some few cases for the loss of travelers' effects. The last shows the total amount of the claim presented for each vessel. In cases in which it is evident that double claims have been advanced, it has been so stated, and that which is called net claims, at the end of the table, is the difference between the gross claims and the double claims.

TABLE No. IV.—*Claims relative to merchant-vessels destroyed by the Alabama.**

Page of statement.	Name of vessel.	Tonnage.	No. of days of voyage.	Claims for the vessel.		Claims for freight.		Claims for cargo.		Claims for personal effects.		Claims for damages and sundries.		Total.
7	Amanda	600	49		$35,000		$33,000				$1,853			$69,853
8	Amazonian	480	41	Double claim.	68,544 36,544		11,000		$53,758		2,601			135,903
					32,000									
13	Anna Schmidt	785	166	Double claim.	50,000 5,000		26,300	Double claim.	216,479 38,078		1,875			294,654
					45,000				178,401					
23	Ariel, steamship		6						10,000				$423	10,423
26	Brilliant	840	20	Double claim.	84,245 9,245	Double claim.	34,531 16,351		5,187		1,250			125,213
					75,000		18,000							
27	Charles Hill	700	41		32,000		11,733				1,543			45,276
28	Chastelaine	295	5		10,414				1,157		100			11,671
28	Conrad	350	12		10,000			Double claim.	84,241 23,669					94,241
									60,572					
29	Contest	1,100	28		45,000		61,500		30,522		4,638		1,206	142,866
31	Crenshaw	280	4		20,000		6,721		753					27,474
32	Dorcas Prince	700	44		27,000		15,000		13,776		3,439		600	59,815
34	Dunkirk	295	8	Double claim.	25,467 8,000	Double claim.	3,936 2,350		19,508		2,374			51,285
					17,467		1,586							
37	Emma Jane	1,100	8		51,039		27,762				5,556 Double claim. 1,200 4,356		2,200	86,557
											980			
38	Express	1,075	123		50,000		31,129							82,109
40	Golden Eagle	1,120	90		56,000		30,000		27,522		1,165			114,689
41	Golden Rule	255	9		10,000		8,207		68,913		1,060			88,180
46	Highlander	1,050	9	Double claim.	114,000 30,000	Double claim.	68,402 6,000				8,709			191,171
					84,000		62,402							
47	Jabez Snow	1,075	43	Double claim.	76,200 6,200		63,408				3,500		3,100	146,208
					70,000									

49	John A. Parks	1,050	19		56,501		42,306		25,700		1,933		360	126,800
51	Justina												7,000	7,000
54	Lafayette 1st	945	3		80,000		18,978		21,537*		1,280			121,795
57	Lamplighter	365	2		13,875		8,780		3,450		1,845			27,950
59	Lauretta	285	3		15,140		3,000		12,200					30,340
61	Louisa Hatch	855	29		67,250		15,000				3,130			85,380
62	Manchester	1 065	7		111,660 Probable double claim... 47,500 64,160		15,000		27,316		1,075		6,105	161,156
63	Martaban	710	12		35,600				15,000		2,322			52,922
64	Morning Star												5,614	5,614
24	Baron de Castine												1,500	1,500
65	Nora	920	40		65,000 Double claim. 15,000 50,000	Double claim .	15,000 5,000 10,000				1,700		1,800	83,500
71	Olive Jane	360	27		35,000		15,000		17,529		2,000		1,000	70,529
73	Palmetto	175	10		100,000				12,400		433			22,833
73	Parker Cook	140	17		9,493		1,625		14,281		665			26,064
74	Rockingham	980	58		148,573 Double claim. 90,000 58,573		78,128				8,755			235,456
76	Sea Bride	450	79		39,500 Double claim. 9,500 30,000	Double claim .	21,000 10,500 10,500	Double claim .	82,445 37,000 45,445		3,393			146,338
78	Sea Lark	975	36		125,500 Double claim. 74,500 51,000		23,500		215,197		1,250			365,447
88	S. Gildersleeve	850	65		35,000									35,000
89	Sonora	710	30		55,800		33,244				2,595		2,875	94,514
90	Starlight	100	31		4,280		1,720				580			6,528
91	Talisman	1,240	35		101,950 Double claim. 33,025 68,925	Double claim .	38,579 22,488 16,091		90,371		2,455			233,355
95	T. B. Whales	600	143		20,000		15,165		190,870 Double claim. 3,000 187,870		2,946			228,981

* The first column on the left shows the page of the revised statement where the claim is found. The second shows the name of the vessel to which the claim refers. The third shows the tonnage of the vessel. The fourth shows how many days the vessel had been on its voyage. The fifth shows what is claimed for the vessel, its outfit, and provisioning, including insurance. The sixth shows the claim for probable gross profits, including the insurance on the same. The seventh shows the claim for profits earned, including insurance on the same. The eighth shows the claim for personal effects, presented by the captain or first mate. The ninth shows the amount claimed for wages, and certain damages and losses which are not losses of property, together with the claims presented in some few cases for the loss of travelers' effects. The last shows the total amount of the claim presented for each vessel. In cases in which it is evident that double claims have been advanced it has been so stated, and that which is called net claims, at the end of the table, is the difference between the gross claims and the double claims.

TABLE No. IV.—*Claims relative to merchant-vessels destroyed by the Alabama*—Continued.

Page of statement.	Name of vessel.	Tonnage.	No. of days of voyage.	Claims for the vessel.		Claims for freight.		Claims for cargo.		Claims for personal effects.		Claims for damages and sundries.		Total.
99	Tycoon	720	39	Double claim.	$67,375 3,375	Double claim	$33,740 1,680		$333,763		$1,471		$11,050	$447,399
					64,000		32,060							
110	Union Jack	485	36	Double claim.	53,000 18,000		6,000	Double claim.	89,886 32,014		2,400		20,888	172,174
					35,000				57,872					
116	Wave Crest	410	8		29,000		4,772		24,092		550		850	59,264
118	Winged Racer	1,770	33		56,833		24,000	Double claim.	276,963 20,000		7,952			365,768
									256,963					
				Gross claims	2,001,179		847,166		1,984,836		91,433		66,571	4,991,183
				Double claims	385,889		64,549		153,761		1,200			605,396
	Gross tonnage	28,260		Net claims	1,615,290		782,617		1,831,075		90,233		66,571	4,385,786

EXPLANATION OF THE TABLE.

I. As regards the fourteen whalers the table shows that the sum of $564,870 in paper is claimed for the vessels and outfits; but $155,467 must be deducted from this sum, as constituting double claims, which leaves a balance of $409,233 in paper.

Moreover, the sum of $1,031,257 in paper is claimed for expected gross profits, from which $11,442 must be deducted as constituting double claims, which leaves a balance of $1,019,815 in paper.

For gross earned profits the sum of $253,905 in paper is claimed, from which must be deducted $13,142, as constituting double claims, which leaves a balance of $240,763 in paper.

The claims for the vessels, outfits, and probable and earned gross profits, therefore, amount, after deducting the double claims, to $1,669,811 in paper.

We estimate the losses for which this claim is made at $458,538 in gold, of which $365,000 represent the value of the vessels and outfits at the beginning of their voyages, and $93,538 represent a profit at the rate of 25 per cent. per annum, together with the wages from the beginning of the voyage up to the time of the capture.

The table also shows that there is a claim for the personal effects of captains, (and in one or two cases for those of the mates of vessels,) which amounts, after deducting the double claims, to $13,496, and for the damages to $152,300 in paper.

As to the claims for personal effects, we have allowed them in full.

As regards the claim for damages, it is composed almost entirely of the following items: $9,000, claimed for the first time in the month of April last, by the mate of the Levi Starbuck, for loss of time; $7,000, claimed by a harpooner, for personal injuries; this claim, however, which is only based upon a letter addressed to the Secretary of the Navy, is supported by no affidavit, and is advanced without any explanation. The other item is a claim for $135,000, in the case of the Ocmulgee, which, it is asserted, is for losses of merchandise on board and profits. We can demonstrate that these claims should be rejected.

II. As regards the forty-four merchant-vessels the table shows the following facts:

The sum of $1,615,290 in paper is claimed for the vessels, outfits, and provisions, after deduction of the double claims.

The sum of $782,617 in paper is claimed for gross freights, after deduction of the double claims; which makes a total of $2,397,907 in paper for the vessels and freights.

We estimate the losses for which this claim is presented at $1,171,469 in gold, of which $1,130,400 represent the value of the vessels and outfits at the beginning of the voyage, and $41,069 the interest on this value and the wages from the beginning of the voyage up to the day of the capture.

The sum of $1,831,076 in paper is claimed for cargoes and profits, insurance and commission on these same cargoes, as well as for damages arising from the non-arrival at the port of destination, after deduction of the double claims, which can be easily shown *for the moment*. We have reduced this claim to $1,626,043 in paper, and we are able to show that this reduction is, in all probability, far from sufficient.

The table shows, moreover, that the sum of $90,233 in paper is claimed for personal effects of captains, (and, in one or two cases, for those of mates likewise,) and $66,571 in paper for damages and sundry losses.

As to the personal effects of the captain or of the crew, we have allowed them to pass in all cases save five. We can show that, in these five cases, the claims are evidently exaggerated, and we have, therefore, reduced them.

As regards the claims for damages, &c., most of them are composed of extravagant demands advanced by the captains of the vessels for wages or for the loss of about twelve months of their time; of a claim of $10,000, presented by a traveler on account of delay; and of another claim of $10,000, also preferred by a traveler for the loss of his position as consul, together with other claims evidently inadmissible.

The estimated allowance for loss of personal effects, damages, &c., is $77,803 in paper.

So that the total allowance, provisionally estimated, for vessels captured by the Alabama is $1,630,007 in gold for the vessels, outfits, freights, and profits, and $1,717,842 in paper for other claims.

TABLE NO. V.—*Claims of provisional claims and allowances as regards the vessels captured by the Alabama.*

Vessels for which claims are brought.	Object.	Claims.				Allowances.
The 14 whalers destroyed, (tonnage, 3,560,) viz: Alert, Altamaha, Benjamin Tucker, Courser, Elisha Dunbar, Kate Corey, Kingfisher, Levi Starbuck, Nye, Ocean Rover, Ocmulgee, Virginia, Lafayette 2d, Weather Gage	Vessels and outlays		$564, 870		$409, 233	$1,669,811	$365,000 + $93,538 = $458,538 for vessels, outlays, (gold dollars,) and profits earned and expected.
		Double claim	155, 467				
	Profits expected		1, 031, 257	$1, 019, 815			
		Double claim	11, 442		1, 266, 578		
	Earned		253, 905	240, 763			
		Double claim	13, 142				
	Personal effects		14, 546	13, 496		165, 796	$13,996 for personal effects and damages, (paper dollars.)
		Double claim	1, 050				
	Damages, &c			152, 300			
The 44 merchant-vessels, (tonnage, 28,260,) viz: Amanda, Amazonian, Anna Schmidt, Ariel, S. S, Brilliant, Charles Hill, Chastelaine, Conrad, Contest, Crenshaw, Dorcas Prince, Dunkirk, Emma Jane, Express, Golden Eagle, Golden Rule, Highlander, Jabes Snow, John A. Parks, Justina, Lafayette, Lamplighter, Lauretta, Louisa Hatch, Manchester, Martaban, Morning Star, Baron de Castine, Nora	Vessels, &c		2, 001, 179	1, 615, 290		2, 397, 907	$1,130,400 + $41,069 = $1,171,469 for vessels, outlays, (gold dollars,) and freights.
		Double claim	365, 869				
	Freights		847, 166	782, 617			
		Double claim	64, 549				
	Cargoes		1, 984, 836			1, 831, 075	$1,626,043 for cargoes, (paper dollars.)
		Double claim	153, 761				
	Personal effects		91, 423	90, 223		156, 804	$77,803 for personal effects and damages, (paper dollars.)
		Double claim	1, 200				
	Damages			66, 571			

Olive Jane							
Palmetto							
Parker Cook							
Rockingham							
Sea Bride							
Sea Lark							
S. Gildersleeve							
Senora							
Starlight							
Talisman							
T. B. Whales							
Tycoon							
Union Jack							
Wane Crest							
Winged Racer							

The entire gross claim, including the double inadmissible claims, those for gross expected profits, gross freights, gross profits earned, &c., amounts to $7,009,129 in paper The total allowance, provisionally estimated, amounts to $1,630,007 in gold for the vessels, outfits, profits, and freights, and to $1,717,842 in paper for the other claims.

TABLE No. VI.—*Analysis of claims relative to the Florida.**

Page of statement.	Name of vessel.	Tonnage.	Number of days of voyage.	Claims for the vessel.		Claims for freight.		Claims for cargo.		Claims for personal effects.		Claims for damages and sundries.		Total.
125	Aldebaran	190	11		$20, 500				$476		$4, 057			$25, 033
126	Anglo-Saxon	870	4		35, 500		$1, 711		5, 500					42, 711
127	Avon	950	116		67, 000		40, 000		45, 701		3, 700			156, 401
129	B. F. Hoxie	1, 390	80		72, 000		26, 000							98, 000
130	Clarence	255	19		8, 000				11, 400					19, 400
130	Commonwealth	1, 275	29		55, 000		24, 250		370, 704		2, 088			452, 042
147	Corris Ann	570	13		20, 000		1, 000		4, 400					25, 400
148	Crown Point	1, 100	39		58, 200		10, 100		394, 771 Double claim. 16, 044 308, 727		4, 842		$20, 000	417, 913
162	Electric	810	1		166, 000				283, 229 Double claim. 40, 000 243, 229					449, 229
171	Estelle	300	6		18, 000									18, 000
173	George Latimer	200	20		12, 034		683		27, 000					39, 717
179	Henrietta	440	36		25, 000		7, 140		32, 131		1, 536			65, 807
180	Jacob Bell	1, 385	96		50, 000		22, 783		308, 290		2, 333		20, 280	403, 686
184	Lapwing	590	19		30, 000		15, 000		30, 000					75, 000
185	M. J. Colcord	375	1		24, 624		10, 000		65, 867					100, 491
187	Mondamin	390	11		18, 129		3, 800		5, 000				1, 143	28, 072
188	Oneida	420	90		21, 802		1, 294		433, 588 Double claim. 17, 017 415, 571		4, 500		4, 942	466, 126
192	Red Gauntlet	1, 040	23		60, 851		15, 188		32, 678		5, 059		25, 000	138, 776
195	Southern Cross	940	77	Double claim. 55, 000 25, 000 30, 000			10, 000				450			65, 450
197	Star of Peace	945	88	88, 000 Double claim. 32, 000 56, 000		Double claim. 41, 884 17, 500 24, 384		Double claim. 368, 176 33, 815 334, 361			550			498, 610
202	W. B. Nash	300	5		9, 950			Double claim. 51, 850 10, 000 41, 850						61, 800
204	W. C. Clark	340	14		5, 000									5, 000
204	Windward	200	150		12, 000				3, 953		500			16, 453
205	Zelinda	560	26		36, 000									36, 000

205	Mary Alvina	260	8		11,000		3,216				304			14,520
206	Tacony	295	10		25,350						772		13,500	39,622
208	Byzantium	1,050	38		45,000		5,787		2,548					53,335
211	Umpire	295	11		6,100		2,200		21,155		150			29,605
		17,735			1,056,040		242,036		2,428,417		30,841		84,865	3,842,199
				Double claim..	57,000	Double claim..	17,500	Double claim..	116,876					
					999,040		224,536		2,311,541					
185	Margaret Davis				16,100						904			17,004
178	Harriet Stevens						1,000		9,500					10,500
209	Goodspeed				35,000				1,293					36,293
172	General Berry			Vessel, &c	31,576						1,267			32,843
178	Greenland	550	2		6,500		7,200		1,600		1,065		360	16,725
														113,365
207	Ada													5,300
210	Marengo													7,296
212	Wanderer													7,839
208	Elizabeth Ann													8,100
210	Rufus Choate													8,325
207	Archer													4,300
210	Ripple													8,805
														49,965
175	Golconda	330	85		38,000		4,536		118,865		680			162,081
195	Rienzi	75	37		7,700		787							8,487
														170,568

Claims, total, $4,176,097.

I. In regard to the first 28 merchant vessels. The first column on the left shows the page of the revised statement where the claim is found. The second shows the name of the vessel to which the claim refers. The third shows the tonnage of the vessel. The fourth shows how many days the vessel had been on its voyage. The fifth shows what is claimed for the vessel, its outfit and provisioning, including insurance. The sixth shows the claim for probable gross profits, including the insurance on the same. The seventh shows the claim for profits earned, including insurance on the same. The eighth shows the claim for personal effects presented by the captain or first mate. The ninth shows the amount claimed for wages and certain damages and losses which are not losses of property, together with the claims presented in some few cases for the loss of travelers' effects. The last shows the total amount of the claim presented for each vessel. In cases in which it is evident that double claims have been advanced, it has been so stated, and that which is called net claims at the end of the table, is the difference between the gross claims and the double claims.

II. In regard to the 5 following merchant-vessels the columns show similar details.

III. In regard to the 7 fishing-vessels the details are not given because the claims have been allowed to pass in full.

IV. In regard to the Rienzi the claim has been allowed to pass in full, and as regards the Golconda the details are the same as above.

EXPLANATION OF THE TABLE.

I. As regards the twenty-eight merchant-vessels the table shows the following facts:

The sum of $999,040 in paper is claimed for the vessels, outfits, and provisions, after deduction of the double claims.

The sum of $224,536 in paper is claimed for gross freights, after deduction of the double claims, which makes a total of $1,223,576 in paper for the vessels and freights.

We estimate the losses for which this claim is advanced at $734,386 in gold; of which $709,400 represent the value of the vessels and outfits at the beginning of the voyage, and $24,986 the interest on this sum, together with the wages from the beginning of the voyage up to the time of the capture.

The sum of $2,311,541 in paper is claimed for the cargoes and profits, the insurance and commission on the same cargoes, as well as for the damages, resulting from the non-arrival at the port of destination, after deduction of the double claims which can be clearly demonstrated *for the moment*. We have reduced this claim to $2,034,156 in paper, and we can show that this reduction is, in all probability, far from being sufficient.

As to the personal effects of the captain or crew we have allowed them to pass in all cases, save four. We are able to show that in these four cases the claims are evidently exaggerated, and we have therefore reduced them.

As regards the claims for damages, they are mainly composed of the following items: There are two new claims brought for the first time in the month of March last by the first and second mates of the Crown Point, for wages and damages; they amount to the extravagant sum of $20,000. There is a claim brought by Martha Williams, a passenger on board of the Jacob Bell, for personal effects amounting to $20,280: we can show that there are sufficient reasons for rejecting this claim. There is also a claim for $13,500, brought by the owners of the Tacony for losses in consequence of the interruption of their business; we are of the opinion that it should be struck out.

II. As regards the five other merchant-vessels we can show that there are special reasons requiring the reduction of the claims to the sums inserted in the table.

III. As regards the seven fishing-vessels and the Rienzi we have allowed the claims to pass in full.

IV. As regards the Golconda we have reduced the claim of $162,081 in paper to $71,005 in gold, in the manner and for the reasons stated on page 27 of the seventh volume of the British Appendix.

So that the total allowance, provisionally estimated, for vessels captured by the Florida, is $805,391 in gold for the vessels, outfits, freights, and profits, and $2,174,585 in paper for other claims.

TABLE No. VII.—*Claims of provisional claims and allowances as regards vessels captured by the Florida.*

Vessels for which claims are brought.	Object.	Claims.					Allowances.
The 28 merchant-vessels, (gross tonnage, 17,735,) viz:							
Aldebaran							
Anglo-Saxon							
Avon							
B. F. Hoxie							
Clarence							
Commonwealth							
Corris Ann							
Crown Point							
Electric Spark							
Estelle	Vessels, &c		$1,056,040	$999,040		$1,223,576	$709,400 + $24,986 = $734,386 for vessels, outlays, (gold dollars,) and profits earned and expected.
George Latimer		Double claim	57,000				
Henrietta	Freights		242,036	224,536			
Lapwing		Double claim	17,500				
M. J. Colcord							
Mondamin	Cargoes		2,428,417			2,311,541	$2,034,156 for cargoes, (paper dollars.)
Oneida		Double claim	116,876				
Red Gauntlet							
Southern Cross	Personal effects			30,841		115,706	$22,710 for personal effects and damages, (paper dollars.)
Star of Peace	Damages			84,865			
W. B. Nash							
W. C. Clark							
Windward							
Zelinda							
Mary Alvina							
Tacony							
Byzantium							
Umpire							
Jacob Bell							
Five other merchant-vessels, viz:							
Margaret Davis						17,004	
Harriet Stevens						10,500	$10,000, (paper dollars.)
Good Speed						36,293	$22,000, (paper dollars.)
General Berry						32,843	$17,267, (paper dollars.)
Greenland						16,725	$10,000, (paper dollars.)
Seven fishing-vessels, viz:							
Ada							
Marengo							
Elizabeth Ann							
Rufus Choate						49,965	$49,965, (paper dollars.)
Archer							
Ripple							
Wanderer							

TABLE No. VII.—*Claims of provisional claims and allowances as regards vessels captured by the Florida*—Continued.

Vessels for which claims are brought.	Object.	Claims.	Allowances.
Two whaling-vessels, viz:			
Golconda		$162,081	$71,005, (gold dollars.)
Rienzi		8,487	$8,487, (paper dollars.)

The entire gross claim, including the double inadmissible claims, those for gross expected profits, gross freights earned, &c., amounts to $4,173,097 in paper.
The total allowance, provisionally estimated, amounts to $205,391 in gold for the vessels, outfits, profits, and freights, and to $2,174,585 in paper for the other claims.

Claims relative to vessels destroyed by the Shenandoah after the month of January, 1865.

Page of statement.	Name of vessel.	Tonnage.	No. of days of voyage.	Claims for vessel.		Claims for expected profits.	Claims for profits earned.		Claims for personal effects.	Claims for damages and miscellaneous claims.		Total.
225	Abigail	310	44		$60,000	$169,849		$1,644	$23,303			$254,696
227	Brunswick	295	52	Double claim.	73,200	38,625	Double claim.	13,379	1,080			126,284
					23,200			1,000				
					50,000			12,379				
229	Catherine	385	84		48,677	196,807		18,329	8,295			272,108
232	Congress	360	755		97,000	53,075		33,845	982			184,902
				Double claim.	41,000							
					56,000							
233	Covington	350	218		32,251	61,507		25,010	9,196			127,964
238	Edward Carey	355	68		42,983	66,600			1,170		$10,000	120,753
238	Euphrates	365	63		59,750	100,875		17,814	3,213			181,652
				Double claim.	9,750							
					50,000							
241	General Williams	420	155		142,350	196,807		36,292	1,485		30,000	406,934
				Double claim.	77,173							
					65,177							

243	Gipsey	360	115	Double claim.	84,000 24,000 60,000		49,075		10,664		9,034			152,773
244	Hector	380	135	Double claim.	81,875 31,875 50,000		99,750		21,347		939			203,911
245	Hillmann	385		Double claim.	91,250 31,250 60,000		54,675		10,490		1,762			158,177
247	Isaac Howland	400	90	Double claim.	125,500 60,500 65,000		196,158	Double claim.	57,554 9,000 48,554		3,937			383,149
248	Isabella	315	270	Double claim.	81,650 21,650 60,000		174,600		27,765	Double claim.	13,222 1,000 12,222			297,237
250	J. Swift	455	72		60,000		138,088		25,500		2,293			225,881
253	Martha	360	86	Double claim.	94,200 34,200 60,000		192,062		9,906		7,690			303,858
255	Nassau	410	67	Double claim.	152,500 72,500 80,000		78,750		9,924		900			241,574
258	Nimrod	340	62	Double claim.	79,000 19,000 60,000		158,500	Double claim.	36,782 9,000 27,782		1,638			275,920
259	Pearl	195	63		27,000		60,890				6,150		6,200	100,240
260	Sophia Thornton	430	41	Double claim.	86,333 27,050 59,283		51,100				2,851			140,281
262	Susan Abigail	160	57		24,397		95,975						107,476	227,848
240	Favorite	295	61	Double claim.	110,000 50,000 60,000		87,250		41,070		2,659			240,979
263	Waverly	330	73	Double claim.	81,250 31,250 50,000		110,876		34,655		1,732			228,513
264	William Thompson	495	56	Double claim.	144,500 54,500 90,000		131,250		15,093					290,843

Claims relative to vessels destroyed by the Shenandoah after the month of January, 1865—Continued.

Page of statement.	Name of vessel.	Tonnage.	No. of days of voyage.	Claims for vessel.		Claims for expected profits.	Claims for profits earned.	Claims for personal effects.	Claims for damages and miscellaneous claims.	Total.
265	W. C. Nye	390	93	..... Double claim. .... Gross claims. Double claims.	$75,000 20,000 55,000 1,954,666 628,898	$218,125 2,781,269	$7,087 453,550 35,292	$625 104,156 1,000	$5,000 158,676	$305,837 5,452,317 684,190
	Gross tonnage	8,560			1,325,768	2,781,269	418,258	103,156	158,676	4,768,127
241	General Pike	315	.....	.....	.....	.....	.....	.....	76,149	386,751
250	James Maury	295	.....	.....	.....	.....	.....	.....	73,039	
255	Milo	400	.....	.....	.....	.....	.....	.....	144,648	
257	Nile	2	.....	.....	.....	.....	.....	.....	92,915	
										5,839,068

Claims for expected profits in case of the vessels captured by the Shenandoah after the month of January, 1865.

Page of statement.	Name of vessel.	Loss of expected profits.	Amount.	Remarks.
225	Abigail	Loss by interruption of voyage.	$169,849	
227	Brunswick	Loss of probable catch	38,625	
229	Catherine	do	196,807	See the original list, p. 436, and the beginning of the second report; it is a new claim.
232	Congress	do	53,075	
233	Covington	do	61,507	
238	Edward Carey	do	66,600	
238	Euphrates	Loss by interruption of voyage.	100,875	
240	Favorite	do	87,250	See the original list, p. 438, and the beginning of the second report; it is a new claim.
241	Gen'l Williams	Loss of probable catch	196,807	See the original list, p. 437, and the beginning of the second report; it is a new claim.
243	Gipsy	do	49,075	
244	Hector	do	99,750	
245	Hillmann	do	54,675	
247	Isaac Howland	do	196,158	See the original list, p. 426, and the beginning of the second report; it is a claim increased by $43,000.
248	Isabella	do	174,600	
250	J. Swift	do	138,088	
253	Martha	Loss by interruption of voyage.	192,062	See the original list, p. 438.
255	Nassau	do	78,750	See the original list, p. 438.
258	Nimrod	do	158,500	
259	Pearl	Loss of probable catch	60,890	
260	Sophia Thornton	do	51,100	
262	Susan Abigail	do	95,975	
263	Waverly	do	110,876	See the original list, p. 436; it is a new claim.
264	Wm. Thompson	do	131,250	
265	W. C. Nye	do	218,125	
	Total		2,781,269	

Double claims in the case of the vessels captured by the Shenandoah after the month of January, 1865.

Page of statement.	Name of vessel.	Loss of expected profits.	Amount.
228	Brunswick	Columbian Insurance Company	$8,000
		Commercial Company	16,200
232	Congress	Atlantic Mutual Company	35,700
		Metropolitan Company	5,300
239	Euphrates	Commercial Mutual Company	9,750
240	Favorite	Metropolitan Company	10,000
		Atlantic Mutual Company	40,000
241	Gen'l Williams	Columbian Company	22,500
		Sun Mutual Company	2,500
		Atlantic Mutual Company	7,500
		Erreur de calcul	44,673
		Atlantic Mutual Company	23,792
243	Gipsy	do	10,000
		Columbian Company	14,000
244	Hector	Union Mutual Company	17,000
		Commercial Mutual Company	4,500
		Mutual Marine Company	10,375
245	Hillmann	Atlantic Mutual Company	26,250
		Metropolitan Company	5,000
247	Isaac Howland	Columbian Company	16,500
		Commercial Mutual Company	15,000
		Atlantic Mutual Company	38,000
249	Isabella	New England Company	1,000
		Commercial Mutual Company	1,000
		Columbian Company	3,050
		Metropolitan Company	800
		Atlantic Mutual Company	16,800

Double claims in the case of vessels captured by the Shenandoah—Continued.

Page of statement.	Name of vessel.	Loss of expected profits.	Amount.
253	Martha	Mercantile Mutual Company	$1,000
		Atlantic Mutual Company	33,200
256	Nassau	Sun Mutual Company	10,000
		Metropolitan Company	9,000
		Atlantic Mutual Company	47,500
		Union Mutual	6,000
258	Nimrod	Atlantic Mutual Company	28,000
260	Sophia Thornton	Ocean Mutual Company	3,050
		Commercial Mutual Company	15,000
		Union Mutual	9,000
263	Waverly	do	31,250
264	Wm. Thompson	Commercial Mutual Company	15,500
		Ocean Mutual Company	16,500
		Union Mutual Company	22,500
265	W. Nye	Atlantic Mutual Company	20,000
	Total		662,690

EXPLANATION OF THE TABLE.

I. As regards the claim of the first four whalers, which were simply detained, we have reduced the claim of $386,951 in paper to $67,446 in gold.

II. As regards the twenty-four whalers destroyed, the table shows that the sum of $1,954,766 in paper is claimed for the vessels and outfits; but $628,898 must be deducted from this sum as constituting double claims, which leaves a balance of $1,325,768 in paper.

Besides the above, the sum of $2,781,269 in paper is claimed for probable *gross* profits.

For *gross* earned profits $453,550 in paper is claimed; from which must be deducted $35,292 as constituting double claims, which leaves a balance of $418,258 in paper.

The claims for the vessels, outfits, and gross profits, both expected and earned, therefore amount, after the double claims have been deducted, to $4,525,295 in paper.

We estimate the losses for which this claim is presented at $1,023,318 in gold, of which $856,000 represent the value of the vessels and outfits at the beginning of their voyages, and $167,368 profit at the rate of 25 per cent. per annum, and the wages from the beginning of the voyage up to the day of the capture.

The table also shows that there is a claim for personal effects of captains (and, in one or two instances, for those of mates of vessels) which amounts, after the double claims have been deducted, to $103,156, and for damages, $158,676 in paper.

As to the claims for personal effects of the captain or crew, they have been allowed to pass in all cases, save six. We can show that in these cases the claims are evidently exaggerated, and we have therefore reduced them.

As regards the claim for damages, it is composed almost entirely of the following items:

In the case of the Edward Carey the captain's claim, first presented in the month of March last, amounts to $10,000 for damages, in addition to his claim for personal effects.

In the case of the General Williams the captain and mate claimed for the first time in the month of March last the sums of $20,000 and $10,000, respectively, for the loss of their probable catch, in addition to their claims for personal effects.

In the case of the Pearl the mate and one Gardener, a cooper, claimed, for the first time, in the month of March last, the sums of $5,000 and $1,200, respectively, for the loss of twelve months' time, in addition to their claim for personal effects.

In the case of the W. C. Nye the captain claims $5,000 for losses in consequence of the abandonment of his voyage, in addition to his claim for personal effects.

In the case of the Susan Abigail there is a claim for $18,716 for merchandise placed on board for commercial purposes, and a claim of $88,750 for the profits which it was expected to realize in such commerce.

We think ourselves able to show to the Tribunal that there is ground for the rejection of all these claims for damages.

Table of provisional claims and allowances as regards the vessels captured by the Shenandoah.

Vessels for which claims are brought.	Object.	Claims.				Allowances.
The 4 whalers, viz:						
General Pike						
James Maury	Damages				$386,751	$67,446.
Milo						
Nile						
The 24 whalers destroyed, (tonnage 8,560,) viz:						
Abigail						
Brunswick						
Catherine						
Congress						
Covington						
Edward Carey						
Euphrates	Vessels and outlays		$1,954,666		$1,325,768	
General Williams		Double claim	628,898			
Gipsy						$856,000+$167,318=$1,023,318, for personal effects and damages, (gold dollars.)
Hector	Profits expected	Double claim	2,781,269	$2,781,267		
Hillmann					3,199,527	
Isaac Howland	Earned		453,550	418,258		
Isabella		Double claim	35,292			
J. Swift						
Martha	Personal effects		104,156	103,156		
Nimrod		Double claim	1,000			
Pearl						
Susan Abigail	Damages, &c			158,676		
Favorite						
Waverly						
W. Thompson						
W. C. Nye						
Nassau						

The entire gross claim, including the double inadmissible claims, those for gross expected profits, gross freights earned, &c., amounts to $5,839,068 in paper.

The total allowance, provisionally estimated, amounts to $1,023,318 in gold for the vessels, outfits, profits, freights, and the profits earned and expected, and to $113,621 in paper for the other claims.

Total of the claims compared.

	Amounts claimed in the following tables.	Amounts granted in the report added to the English argument.
ALABAMA.		
Class A	$1,314,286 99	$460,893 00
Class B	1,396,430 83	618,538 00
Class C	3,309,876 10	2,004,376 00
Class D	413,288 33	136,021 00
Class E and F	123,807 78	47,850 00
	6,557,690 03	3,267,678 00
FLORIDA, COMPRISING CLARENCE, TACONY.		
Class A	228,941 92	108,564 00
Class B	539,179 10	644,709 00
Class C	3,339,410 02	1,776,357 00
Class D	138,929 17	44,570 00
Class E and F	278,618 62	61,350 00
Class G	91,225 10	.....
	4,616,303 93	2,635,568 00
SHENANDOAH.		
Class A, and supplement	3,981,175 55	4,171,464 00
Class B	118,554 43	29,630 00
Class C	149,635 06	99,582 00
Class D	107,075 04	37,560 00
	4,356,440 04	1,338,236 00
RECAPITULATION.		
Alabama	6,557,690 03	3,267,678 00
Florida	4,616,303 93	2,635,568 00
Shenandoah	4,356,440 04	1,338,236 00
	15,530,434 00	7,241,482 00
We here add all the claims arising from the interruption of voyages and losses of expected profits	4,009,302 50	.....
	19,539,736 50	7,241,482 00
Present claims of the United States for expenses caused to their Navy by acts of the Florida, Alabama, and Shenandoah	6,735,062 49	940,460 24
	26,274,798 99	8,181,942 24

The United States claim interest on the whole amount at 7 per cent. per annum up to the day of payment, according to the terms of the Treaty.

XV.—REPLY OF THE AGENT OF THE UNITED STATES TO THE NEW MATTER INTRODUCED BY THE AGENT OF HER BRITANNIC MAJESTY ON THE CALL OF THE TRIBUNAL FOR ELUCIDATION IN RESPECT TO THE TABLES PRESENTED BY THE TWO GOVERNMENTS.

The tables presented to the Tribunal by the agent of Her Britannic Majesty on the 19th and 26th instant, under the call for a comparative statement of the British and American tables then already presented, are new, in substance as well as form, and contain new criticisms on the American tables. The agent of the United States makes no exception to this liberty taken by the British agent.

His Government courts a free discussion of all its claims, and has no desire to shut out criticism by technical objections. He claims, however, his right, under the Treaty, to reply to the new matter introduced under the call for elucidation made at the request of the Viscount d'Itajubá.

I.—THE QUESTION OF GOLD OR PAPER.

It is several times stated in the papers presented by the British agent that the claims of the United States are made in paper-money. This is a mistake. They are made in gold, unless when expressly stated to be made in paper. The proof of this is multifarious.

(*a*) The Treaty provides that the award is to be paid in gold. The claims are submitted under the provisions of the Treaty. The strong presumption is, therefore, that the claimants stated their claims in the currency in which the judgment is to be made, viz, coin.

(*b*) This presumption is strengthened by the fact that during the war the merchants on the Atlantic coast engaged in foreign trade, and many or most of the large insurance companies on that coast, and all persons engaged in business on the Pacific coast, kept their books and accounts in coin.

(*c*) It is also strengthened by the fact that the cruises of many of the vessels destroyed began before the paper-money of the United States had depreciated.

(*d*) It is also strengthened by the internal evidence contained in the Revised List of Claims filed April 15, 1872.

The subject is mentioned under the heads of the following vessels captured by the Alabama:

1. *The Amanda*, (*page* 7.)—The insurance deducted from the claim of Isaiah Larrabee, £179 sterling, is stated to amount to $866.36. This is the exact sum of coin which the sterling should yield with exchange at par, viz, $4.84 to the pound.

2. *The Brilliant*, (*page* 27.)—The claim for freight, £3,415 9*s.* 8*d.* is stated to amount to $16,531.03. This also is the exact sum in coin which the sterling should yield at par.

3. *The Chastelaine*, (*page* 28.)—Here a claim in gold is converted into currency, showing expressly that the whole claim is in currency.

4. *The Martaban*, (*page* 64.)—The loss (80,000 rupees) is stated to amount to $35,600. This is undoubtedly stated in gold.

5. *The Nora*, (*page* 65.—The claims are stated in gold.

6. *The Sea Lark.*—The claim of F. M. and Mary Jane Rawlins (page 82) is stated with an insurance deduction of "$1,565 gold." This shows that the whole claim is in gold. It also shows that the insurances were paid in gold. Under the head of the Florida some claims are expressly advanced in gold, *e. g.*, under the Commonwealth, the claims of Hortsman, Page, Buchman, and Myer, (page 136.) Independently of the general considerations already presented, this offers the best reason for supposing that the other claimants also have made their claims in gold. See also Williams's claim, under the Jacob Bell, page 182.

(*e*) A payment, even in gold, a year hence, at the full rate of the claims, will not enable the individual claimants to restore to the United States the full measure of the national wealth destroyed by the Florida, the Alabama, and the Shenandoah after leaving Melbourne, because, as is well known, the purchasing power of gold has diminished about 50 per cent. within the last ten or twelve years. Therefore the same amount of coin now would not represent the same amount of values in ships and their equipments, and in cargoes, which it did in 1863. And as these proceedings have no relation to contracts, in which the representative of values is to be restored to the claimant rather than the values themselves, but relate to injuries which are to be compensated to the full measure of the damage—that is, to a measure which will restore the sufferer to the condition in which he was before the injury was inflicted—these considerations should be regarded by the arbitrators. And even should they come to the conclusion that some exceptional claims are stated in paper-currency, they will also see that the loss in the purchasing power of gold since the injury took place is greater than the difference between gold and paper at the time of the injury, so that a payment a year hence, even in gold at the rates claimed, will not, and in the nature of things cannot, be a restoration to the United States of the national wealth destroyed through the fault of Great Britain.

II.

The allegation that new claims have been introduced into the United States tables is not true in the sense in which the Agent of the United States understands the rights of his Government under the Treaty.

(*a*) It has already been shown to the Tribunal that the United States in their case made claim for all "their direct losses growing out of destruction of vessels and their cargoes by insurgent cruisers," (Am. Case, page 469,) under which they classified "claims for damages or injuries to persons growing out of the destruction of each class of vessels," (*ibid.*,) and that they asked the Tribunal, "from the data which were furnished to ascertain the names and the tonnage of the different vessels destroyed, and to form an estimate of the number of hardy but helpless seamen who were thus deprived of their means of subsistence, and to determine what aggregate sum it would be just to place in the hands of the United States on that account," (*ibid.*, page 471.)

(*b*) The real question raised by the agent of Her Britannic Majesty is, therefore, not whether the United States have presented new figures which were not contained in their former statements, (although advanced in the gross in those statements as forming part of their losses,) but it is this, viz: whether the Tribunal, in the exercise of the power to award a sum in gross, conferred upon it by the seventh article of the Treaty, should limit itself by the rules and modes of proceedings prescribed for the assessors in the tenth article.

(*c*) The assessors are to be allowed by the Treaty two and one-half years to conclude their examinations, and they are required to examine each claim separately and to render their decision in each case on the proofs adduced.

(*d*) But the Tribunal is to make its decision on a gross sum, if possible, in three months from the submission of the argument, having first exhausted the most of the time in determining, separately as to each vessel, whether Great Britain is responsible for its acts; and there is nothing in the Treaty requiring them to make their decision on the examination of proofs furnished by the parties.

(*e*) The gross sum which the Tribunal may award is to be accepted by the United States as a satisfaction of "all the claims *referred* to it, (Art. VII,) not of all the claims *presented* by them.

(*f*) It is therefore manifest that the Treaty contemplated that the individual Arbitrators, in reaching such a gross sum as they might see fit to award, should have regard to all considerations of damage or injury to the United States within the scope of the arbitration, whether presented in detail or not, and that they should be at liberty to award such sum as justice might require, without a minute examination of detailed proofs.

(*g*) Respecting the wages claimed in our tables, the Arbitrators will find in the volumes of the American Appendix statements of the numbers of the officers and crews of several of the vessels destroyed by the insurgent cruisers, and in the proofs statements of the wages of such persons. From these particular proofs they will be able to determine whether the estimates in our table of the amount of the claims presented originally in the American Case are, or are not, correct. Respecting the claims for effects, the same proofs show that, in cases in which such claims have been actually presented in detail, they equal or exceed the average claims in our tables. The Arbitrators have therefore the means of determining, with the reasonable accuracy contemplated by the Treaty, the amount of the injury suffered by the United States in each of these respects.

(*h*) The agent of the United States assumes that the Arbitrators will not regard the vessels destroyed by the cruisers as phantom ships, without officers or crews. On the contrary, he supposes that they will assume that they were officered and manned, and that from the general proofs in the case, and from their own knowledge, and from any other sources of information within their reach, they will determine whether the statements in our tables regarding these numbers are, or are not, probably correct.

(*i*) A gross sum, made up without regard to these classes of losses, would not be a due compensation to the United States for the injuries complained of before this Tribunal.

III.—Prospective catch.

On this subject it is only necessary to repeat what has already been said on the part of the United States.

In the memorandum accompanying the tables presented by the agent of the United States on the 10th instant, it was said, (see page 168:) "In the American statement, particularly in the claims growing out of the destruction of whalers, prospective profits, or prospective catch, enter into the computation of damages." (See Note D, American Argument.)

"In accordance with the suggestions of some of the Arbitrators, we have eliminated from these tables the claims for prospective catch,

amounting to $4,009,302.50, but we do not intend to retire these claims nor to suggest that we do not think them just. On this subject we refer the Arbitrators to the note from the American Argument cited above."

And in the note accompanying the statement made by the American Agent on the 26th instant, it was stated that "the claims for whalers and fishermen's wages, for vessels destroyed or detained by the Alabama, by the Florida, or by the Shenandoah, (with the correction of the errors noted in the memorandum accompanying our tables,) estimated from the proofs presented, were $588,247.50;" and it was said that "this amount should be deducted from the total amount in the annexed summary, if the Tribunal allow the whalers' claims for prospective catch or interruption of the voyage." And it was further said in that memorandum that if the Tribunal should be of the opinion that the prospective catch should not be allowed, then "we ask, as an equivalent, an allowance of 25 per cent. on the value of the vessel and the equipment," and in the said note we gave the amount so to be added at $400,127.91. It cannot therefore be said with truth that the United States abandon the claims for prospective catch or prospective profits, or that they present them as double claims.

IV.—Freights.

In the memorandum above referred to it was said that, "according to the arbitrary assumption of the British statements, the freight claimed by the United States in the name of their mercantile marine is gross freight, and those statements reject all claims for freight; while on our side, in the absence of all evidence to the contrary, we assume that these reclamations are for net freight." And in the note above referred to it is said that "in all cases in which the Tribunal is satisfied that the freight claimed is *net freight*, the claim for wages should be allowed, but in all cases in which the Tribunal is satisfied that the claim for freight is for *gross freight* the claim for wages should be disallowed."

It cannot be said, therefore, that we either make double claims in this respect or do not indicate to the Tribunal the questions for their investigation.

V.—Double claims.

The Agent of the United States has thought that it did not become him to assume the province of the Tribunal by deciding in advance what claims for insurance are and what are not double claims. He has, instead of such a course, indicated in the tables presented by him such claims as, in his opinion, are clear from doubt, such claims as may or may not be double, and such claims as on their face appear to be double, but which yet deserve the scrutiny of the Tribunal. These columns are thus referred to in the memorandum accompanying the tables: "Column three shows the claims for insurance, which are clearly not double claims. Column four shows the claims for insurance about which the evidence is silent. It is possible that some of these should be withdrawn from the aggregate of column two. This can only be determined by the examination of the particular facts in each case. Column five shows other claims for insurance in which the owners of the property destroyed claim at the same time full indemnity for their losses without regard to the insurance embraced in this column."

VI.—General remarks on the character of the claims.

It is said that the United States admit that these claims have never been audited. This is true only in the sense that they have never been subjected to official scrutiny such as they would receive at the hands of assessors. But it is not true that they have not been carefully examined, as is charged by the British Agent. On the contrary they were carefully scrutinized, document by document and proof by proof, under the superintendence of the Solicitor of the United States in these proceedings, and the abstract of the proof was in every case carefully verified with the original documents on file in the Department at Washington, and referred to in the Revised List of Claims.

In the American Case profert was made of the original proof, should it be desired; and, had the request been made by the British Agent, those proofs would have been here. It is also not admitted that the American claims are in any way exaggerated, or that, as now revised, the statements on our side contain any material errors.

GENEVA, *August* 28, 1872.

XVI.—NOTE ON SOME OBSERVATIONS PRESENTED BY MR. BANCROFT DAVIS ON THE 29TH AUGUST.

The Agent of the United States has forwarded to the Agent of Her Britannic Majesty, and has, it is supposed, delivered to the Tribunal, a paper containing some observations, to which it may be proper briefly to reply.

It will be convenient for the sake of brevity to refer to the various points to which these observations relate in the order in which they are mentioned by the Agent of the United States.

I.—*As to the United States Tables and the British Tables and allowances generally.*

On comparing the British allowances, as stated in the United States Tables, with those contained in the British Tables, it will be found that the total allowances have been recently "*increased.*" This arose from a desire to save the time of the Tribunal and to avoid disputes on minor matters, which led to all the claims for personal effects being allowed, except a few which were manifestly extravagant. In *no* case have the total allowances in respect of any one cruiser been diminished. The alterations, therefore, in the British Tables are not such as the United States have any reason to complain of. On the other hand, where the claims in the United States Tables differ from those in the Revised Statement, they have been invariably increased, and in some cases to no inconsiderable extent.

II.—*As to the Currency question.*

It appears from the paper presented by the United States Agent being occupied by this more than by any other question, that it is felt to be a question of considerable importance, but it appears to the Agent of Her Britannic Majesty that the arguments urged in that paper strongly confirm the view which has been submitted on this matter in behalf of Great Britain. The reasons for this opinion are briefly as follows:

(*a*) The circumstance of the Treaty providing for the payment of the claims in gold would no doubt have raised a presumption that they are made in that currency, if they had been originally advanced subsequently to the Treaty. The fact, however, is that a list of the claims was prepared and was presented to the Congress of the United States as early as the year 1866, and that the claims now advanced are founded on this list of claims; that they are in very many cases identical with, that they never fall short of, but in a great many cases considerably exceed, the latter claims. Under these circumstances, as it is almost certain that the claims advanced in 1866 were estimated in the ordinary paper-currency, except in some few cases where gold-currency is expressly referred to, it seems to follow that the claims on which the Tribunal is called upon to adjudicate must also be considered as estimated in paper-currency.

(*b*) This conclusion is strongly confirmed by the fact that in the well-known report which was presented to Congress in the year 1870, and which contains most valuable tables, showing the average value of American ships and their gross earnings, gold-currency is specially designated as "specie-currency," to distinguish it from the ordinary paper-currency.

(*c*) The same conclusion is actually proved almost beyond a doubt by the very facts cited in the paper now under consideration, for they show that, in the few instances in which the claims are made in gold, there is some special reference to that circumstance—a circumstance which necessarily leads to the inference that these are the exceptional and not the ordinary cases.

(*d*) The Agent of Her Britannic Majesty entirely denies the extraordinary allegation that the purchasing power of gold has, during the last eight years, diminished 50 per cent., and is also at a loss to conceive what bearing the alleged fact, if true, ought, according to any sound principles of jurisprudence, to have on the decision of the Tribunal.

III.—*As to the wages.*

The Tribunal has already decided that there should be an allowance made to the masters, officers, and crews of the whalers of one year's wages. It is therefore clear that the additional claims for these wages contained in the United States tables must be struck out. As regards the wages of the merchant-vessels, they will be referred to in the course of the observations to be presently made in reference to the freight of those ships.

IV.—*As to the personal effects.*

Many claims for personal effects, some of them of an extravagant amount, are comprised in the Revised Statement. There is certainly no reason to believe that any were omitted which could with any propriety have been advanced. The new and very large claims for personal effects, advanced on the 19th August for the first time, are purely conjectural and are not supported by any evidence which has been presented to the Tribunal. Indeed, it is almost certain that no such evidence could have been adduced, for, from Captain Semmes's Journal and other sources of information, it is well known that it was neither the policy nor the practice of the captains of the confederate cruisers to seize or destroy the personal effects of the officers or crews of the captured vessels.

The Agent of Her Britannic Majesty also begs the Tribunal to bear in mind that to advance these claims without the slightest evidence in support of them is to act quite inconsistently with the assertion so frequently made in behalf of the United States that all the claims are supported by the affidavits of the claimants themselves, and there does not seem any reason why the United States might not with equal plausibility have advanced a series of new hypothetical claims for the effects of the numerous American passengers who might be imagined to have been on board the captured vessels.

V.—*As to the prospective catch.*

The question relating to the enormous claim for prospective catch—a claim which has been increased in so striking and unjustifiable a manner since the year 1866—has been already decided by the Tribunal. The Agent of Her Britannic Majesty therefore thinks it his duty to refrain from making any observations on this subject.

VI.—*As to the freights of the merchant-vessels.*

The Agent of Her Britannic Majesty is surprised to meet with a repetition of the assertion, made for the first time on the 19th August last, that the claims for freights should be taken as claims for *net* and not for *gross* freights. These claims in the case of the Alabama amount to more than 45 per cent. of those for the vessels and outfits; but on looking at the Report presented to Congress in the year 1870, it will be found in table XVI that the average *gross yearly* earnings of American vessels engaged in foreign trade from the year 1861 to the year 1870 amounted to 33⅓ per cent. of the values of the vessels. Under these circumstances the Agent of Her Britannic Majesty is at a loss to conceive how, in the face of this well-known official estimate, it can with any plausibility or propriety be contended that the claims of 45 per cent. of the values of the vessels on voyages which would not average more than six months, that is to say, claims equal to a gross return of 90 per cent. per annum, are claims for *net* freight, or how it can be even denied that they are greatly exaggerated, even when considered as claims for *gross* freight.

The Tribunal has decided that one-half this large amount should be allowed, and it certainly must be admitted that this allowance would be amply sufficient to cover, not only the net profits expected to be derived by the ship-owners from these voyages, but also any wages which the officers and crews could be reasonably supposed to have lost.

VII.—*As to the double claims.*

These are of two descriptions: those which are avowedly and expressly made and which are admitted in the United States tables, but nevertheless included in the alleged total, and those which are tacitly made, and which are not denied by the United States Government, but are left by them for the determination of the Tribunal. As regards the former class, amounting to $869,400, the Agent of Her Britanic Majesty confidently submits that the suggestion made by the Tribunal ought to have been at once adopted, and that these double claims should have been struck out, and ought not to have been included in the total claim which is stated in the United States tables, and which is there compared with the total British allowance of $7,074,710.

As regards the double claims tacitly made, they were, many months ago, specifically pointed out in the British Reports, and there shown to be double claims.

The United States Government has had all the evidentiary documents in its possession for a long time, and has, according to the statement now made by its agent, carefully examined them. Such being the case, it is submitted by the Agent of Her Britannic Majesty that, as the United States Government does not now deny these double claims, they must, of course, be deducted. The double claims altogether considerably exceed a million and a half of dollars.

Finally, it is now alleged by the Agent of the United States that his Government has carefully examined the documents which are filed at Washington.

The assertion that that Government had never audited the claims is to be found in the Argument of the United States, and is there used as an excuse for the double claims not having been excluded. It seems also to be the only reason for the very inaccurate statement made in that argument to the effect, "that very few, if any, double claims exist, except in the case of the whaling-vessels destroyed by the Shenandoah,

there being none of this class of claims in the case of the merchant-ships." To what extent this statement is incorrect is at once apparent on looking at the United States tables themselves. Moreover, it seems difficult to reconcile the statement that these claims have really been carefully examined on behalf of the United States Government, with the fact of the presentation to the Tribunal of some of the very extravagant claims enumerated in the British Report, such as a claim of $7,000 by a harpooner for personal injuries, which are in no way indicated or described; a claim of $15,000 by the master of the Louisiana, for interruption of business—neither of which claims is to be found verified by any affidavit whatever; a claim of $10,000 by a passenger, for loss of office of consul; a claim by Ebenezer Nye, the master of the Abigail, for more than $17,000, for personal effects, &c.; claims by masters and mates of vessels, (over and above their demands for personal effects,) of $20,000 and $10,000, for the loss of wages, and many other similarly exorbitant claims, which are more specifically referred to in the British Reports.

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